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Laura E. Little

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EMPOWERMENT THROUGH RESTRAINT: REVERSE PREEMPTION OR HYBRID LAWMAKING?

Laura E. Little[†]

ABSTRACT

In the jurisprudence of federal jurisdiction, we often observe federal courts exerting power and control under the banner of restraint and deference to states and to other branches of the federal government. This Article explores two examples of this empowerment technique, in which the United States Supreme Court deployed federal judicial power to resolve choice of law questions. The examples come from diverse contexts: foreign affairs and bankruptcy. In both contexts, the Roberts Court acted in the name of respect for state prerogatives, but bestowed on itself and other federal judges considerable latitude to determine the outcome of suits.

*The foreign affairs illustration of this “negative” empowerment technique is the Supreme Court’s 2008 decision in *Medellin v. Texas*. Framed as a choice of law case, *Medellin* presented the choice between state procedural default rules and treaty provisions interpreted by the International Court of Justice. The bankruptcy illustration*

[†] Professor of Law and James E. Beasley Chair in Law, Temple University School of Law. Copyright held by Laura E. Little 2009. I am indebted to Professors Margaret Howard and Jonathan Lipson for sharing their bankruptcy expertise, Professors Peter Spiro and Peggy McGuinness for sharing their international law expertise, Professor Craig Green for sharing his thoughts on the federal jurisdiction issues in this project, and to my research assistants Alice Ko and Daniel Tyman. This project was made possible by funds from The Clifford Scott Green Chair and Research Fund in Law.

derives from a line of cases beginning with Butner v. United States and analyzing the choice between state law and federal bankruptcy law. In both illustrations, the Supreme Court named state law as the “winner.”

Beyond showing how the Supreme Court’s choice of law analysis empowers the federal judiciary, this Article also explores how the Medellín and bankruptcy cases add to a growing body of hybrid law. Working within the confines of federal principles, the Court allowed other sovereignties (states) to provide meaningful contributions to federal regulation and thereby successfully navigated a permeable line between state and federal law. This bodes well for the future of hybrid lawmaking in general. Might the Court’s approach also provide an upbeat message for debates about whether United States courts should integrate international and transnational principles in their decisionmaking?

INTRODUCTION

Behold the hand of restraint. It works in unexpected ways. What is billed as restraint and deference can operate as power and control. We witness this often in the federal courts area. Abstention and standing doctrines are common, easy examples. We have long seen how, using these doctrines under the banner of judicial restraint, the United States Supreme Court has influenced—and in some cases arrested—the development and enjoyment of federal guarantees.¹ I explore here two more recent examples of this technique, in which the Supreme Court deployed federal judicial power to resolve legal issues broadly characterized as choice of law questions. In resolving the choice of law questions, the Supreme Court acted in the name of respect for state prerogatives. Yet by deferring to state authority, the Court bestowed on itself and other federal judicial officers considerable latitude to determine the outcome of suits.

Many have remarked on the Roberts Court’s apparent tendency to find federal preemption of state regulation.² For Justices who usually

¹ See, e.g., Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 115 (1984) (“[J]udicial lawmaking through abstention can very directly undermine [a carefully structured federal statutory] goal.”); Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 881 (2008) (providing a detailed look at how the United States Supreme Court has “transformed standing doctrine to control the conditions of developing constitutional doctrine”).

² Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 968 (2008) (“Every preemption case decided so far by the Roberts Court has been decided in favor

champion states' rights, this support for expansive federal authority might be surprising. Allowing state law to flourish, one might argue, dovetails most closely with a world view giving dominance to state sovereignty.³ But, in fact, federal power plays are not reserved to those cases in which federal actors affirmatively stake out areas of federal domain. Dominance does not always come in positive form. Indeed, through negative constraint—apparently withholding federal regulatory power—the Roberts Court has reinforced federal prerogatives, at least those enjoyed by the federal judicial branch through doctrinal development.⁴

My two illustrations for this negative approach come from diverse contexts: foreign affairs and bankruptcy. While the foreign affairs illustration—*Medellin v. Texas*⁵—has already been widely associated with preemption,⁶ the bankruptcy illustration has not.⁷ Framed as a

of finding preemption. All have involved business challenges to state and local regulations on the grounds of preemption by federal law." (footnote omitted)); *Term in Review—Civil Cases: Landmark Constitutional Opinions, Pro-Business Rulings Characterize Term*, 77 U.S. LAW WEEK 3033, 3035 (July 22, 2008) [hereinafter *Term in Review*] (quoting Seth Waxman describing finding of preemption "somewhat surprising" in 2008 cases); David G. Savage, *Trumping the States: Business Is Finding Success in Federal Pre-emption Cases*, ABA J., May 2008, at 26 (describing pro-business benefits of United States Supreme Court's business jurisprudence); Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES, March 16, 2008, (Magazine), available at <http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?> (reviewing the exceptionally pro-business orientation of recent Supreme Court cases). The Roberts Court's record reflects trends similar to those of the Rehnquist Court. See, e.g., Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1431 (2006) (observing the Rehnquist Court's expansive view of preemption, even in view of its "billing as staunch protector of states' rights").

³ Erwin Chemerinsky's theory is that conservative Justices are voting to protect strong business interests, presumably undaunted by the federalism implications of their votes. Chemerinsky, *supra* note 2, at 972 ("Preemption issues create an opportunity for an unusual coalition between more liberal Justices, like Stephen Breyer, who favor more expansive national power, and conservative Justices, like Antonin Scalia and John Roberts, who are strongly pro-business." (footnote omitted)).

⁴ The Roberts Court's assertion of federal court power is also arguably at odds with conservative horizontal separation of powers rhetoric found in recent opinions. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2279–80 (2008) (Roberts, J., dissenting) (complaining that the majority opinion in the case was not about the decision's specific consequences, but "about control of federal policy" and shifting "responsibility for . . . sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary").

⁵ 128 S. Ct. 1346 (2008).

⁶ See, e.g., *Term in Review*, *supra* note 2, at 3038 (describing *Medellin* as "effectively yet another preemption case"); see also *Medellin*, 128 S. Ct. at 1377 (Breyer, J., dissenting) (describing the critical question in the case as "whether the Supremacy Clause requires Texas to follow, i.e., to enforce, [the] ICJ judgment").

As for what constitutes "preemption," Kevin Clermont provides the following helpful summary:

Preemption . . . is an ill-bounded constitutional doctrine that invalidates state law if it interferes with federal law. Although preemption tends to focus on displacement of state substantive law by congressional statute, judges and commentators recognize

choice of law case, *Medellin* presented the choice between treaty provisions (as interpreted by the International Court of Justice) and state procedural default rules. The bankruptcy cases present the choice between state and federal bankruptcy laws. In both contexts, the Supreme Court named state law as the “winner.”

Part of this Article’s goal is to demonstrate how in fact *federal* authority was much more the “winner” in these cases than the Supreme Court let on. I will show how—as in other instances where federal authority regulates through deference—these recent choice of law decisions empower a strong federal judiciary. But my purpose transcends simply characterizing cynically the Supreme Court’s choice of law analysis as a means of flexing federal judicial muscle. Rather, I seek an upbeat, durable message grounded in the observation that both of these diverse contexts (foreign relations and bankruptcy) prompted the Supreme Court to add to a growing body of hybrid law. Working within the confines of federal principles, the Court allowed other sovereignties (states) to provide meaningful contributions to federal regulation. What is often glibly regarded as a strict boundary separating state and federal legal principles did not act as a strict boundary at all. In both contexts, the Supreme Court navigated a permeable line between state and federal law without apparently derogating federal sovereignty or identity.

Whether or not one agrees with the ultimate result of *Medellin* and the bankruptcy cases, federal judicial control of the doctrine governing the relevant subject matters remained intact. Might this provide a reassuring message for debates about whether United States courts should integrate international and transnational principles in their decisionmaking? Even if skeptical judges are not persuaded by this message, the case studies here provide lessons that inform scholarly projects advocating hybrid legal regulation. I take up these issues at the end of this Article. First, however, I lay the groundwork by reviewing *Medellin*, the bankruptcy cases, and their jurisprudential qualities. Only then do I reckon with controversies surrounding

that it can displace state procedural law too, and that it can occur by federal administrative act or even by the effect of federal common law. Preemption can be express or implied; and implied preemption can trump a state provision that conflicts by discrimination against or contradiction to federal law or stands as an obstacle to federal law, or can authorize federal law to occupy exclusively a whole field

Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 5–6 (2006) (footnotes omitted).

⁷ The bankruptcy illustration comes from the confluence of three cases, only one of which was actually rendered by the Roberts Court: *Travelers Cas. & Sur. Co. of America v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006); and *Butner v. United States*, 440 U.S. 48 (1979). I focus primarily, however, on the *Travelers* case.

hybrid lawmaking and the role of foreign and international law in United States adjudication.

I. FOREIGN AFFAIRS AND BANKRUPTCY CASE STUDIES: RANDOM SAMPLES OR FEDERALISM ALLIES?

On initial impression, the case studies analyzed here could hardly seem more different. *Medellin v. Texas* was a criminal case that came before the Supreme Court as part of its power to review state court decisions. *Medellin* presented a public law matter, implicating principles of federalism, foreign affairs, and international issues, as well as questions of horizontal separation of powers among the federal government's branches. The bankruptcy cases, on the other hand, came to the Supreme Court exclusively from the federal court system and concerned private law disputes between debtors and creditors, implicating technical areas of insolvency where few but expert practitioners dare to tread. For my purposes here, the two case studies nonetheless both illustrate common dilemmas raised when state law clashes with other potential laws that might govern a controversy. In both case studies, the Supreme Court chose the same resolution: allow state law to control, but only under circumstances carefully controlled by federal judicial authority.

While I am cautious in making sweeping analogies between the two contexts,⁸ I note their shared pedigree. Indeed, concerns related to both bankruptcy and foreign affairs served as significant catalysts for the framing of the Constitution. For foreign affairs, the Framers sought to remedy deficiencies in the Articles of Confederation that enabled the states to undermine effective national foreign policies.⁹

⁸ Cf. Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 611 (2008) ("Bankruptcy exceptionalism has been an operating principle in the creation and development of the bankruptcy power since the Framing.").

⁹ See, e.g., CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 131–35 (1966) (explaining that the Framers were greatly motivated by fears regarding foreign influence over individual states and acknowledgment of a need to participate in foreign politics to engage in international commerce); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 462–78 (2000) (stating that a major impetus behind drafting the Constitution was a need to establish federal government's ability to enforce international law); *id.* at 464 n.53 (emphasizing the Framers' determination to integrate international law into the law of the nation, as they "viewed adherence to international law as a concomitant to sovereignty" (quoting Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1084 (1985))); Anna von Franqué, Comment, *Pineapples, Presidents and the Federal Courts: A Defense of the Federal Common Law of Foreign Relations and a New Framework for its Application*, 35 SW. U. L. REV. 253, 267–68 (2006) (stating that the Framers were primarily motivated by a desire to address deficiencies in the Articles of Confederation,

Likewise, the Framers may have established Congress's Bankruptcy Power in response to pro-debtor actions that were allowed to flourish under the Articles.¹⁰ For both subject matters, the Framers acted with deep awareness of the ramifications for federal and state sovereignty. One would therefore expect that a similar approach to federalism should inform choice of law decisions in both contexts. Although the two contexts represent apparently random samples of case law from the Roberts Court, they presented the Court with opportunities to treat similarly the relationship between state and federal laws. That is, in fact, what occurred.

A. Foreign Affairs: Medellin v. Texas

Medellin v. Texas is an enormously important decision, rich in its ramifications for law and politics. The case revealed the Roberts Court's approach to treaty interpretation as well as its response to assertions of presidential prerogative on foreign affairs matters. More importantly for purposes here, *Medellin* presented a chance for the Supreme Court to declare that state law trumps United States treaty

especially in the arena of implementing effective foreign policy); *see also* *Intl Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993) (reasoning that Congress was given exclusive power over imposing duties and tariffs on imports because of the Framers' view that it was important for the nation to "speak with one voice" when regulating international commercial relations, given the possible effect on foreign relations (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-86 (1976))); *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 555-56 (1959) (describing the Framers' view that federal control over foreign economic relations and speaking with "one voice" internationally also serves as an instrument to protect domestic manufacturing); *THE FEDERALIST NOS. 3, 4*, at 20, 24-25 (John Jay) (E.H. Scott ed., 1898) (stating that reserving foreign relations powers to the federal government is the best way to maintain peace with other nations and provide an effective defense), NO. 42, at 231-33 (James Madison) (explaining that vesting federal government with the exclusive power to deal with foreign nations is superior to the system under the Articles of Confederation).

¹⁰ Little is actually known about the history of the Bankruptcy Clause in the Constitution. *See, e.g.*, Lipson, *supra* note 8, at 625. As a threshold point of interpretation, however, it is significant that, at the time of the Constitutional Convention, America was suffering from a post-war financial collapse. *See* MERILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, at 187-92 (1950) (detailing the economic troubles of the newly independent colonies under the Articles of Confederation). The increasing debtor class was exercising its power, leading many state legislatures to pass pro-debtor laws, including those that abolished imprisonment for debtors and allowed debtors to use land as payment. In addition to the state legislatures, state courts responded to pressure from debtors, showing prejudice against out of state creditors. *See* CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 28 (1913). This practice worried the Federalists who were aligned mostly with the creditor interests. *See* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 94 (1993) (discussing the concern the Federalists had for state legislative prejudice against out of state debtors). One of the proposals the Federalists made in response to this concern was the Constitution's Bankruptcy Clause, giving to Congress the power to establish bankruptcy laws.

obligations as interpreted by an international tribunal and the President of the United States.¹¹ Characteristically for cases with choice of law implications, *Medellin* was not accompanied by significant attention in the public and press; that attention was devoted instead to other blockbuster constitutional cases from October Term 2007.¹² Even among legal scholars, my characterization of *Medellin* as a choice of law decision is unusual.

Medellin concerned a Mexican death row inmate who, at the time of his arrest and trial, had not been told by Texas authorities of his right to speak to his home consulate—a right guaranteed under the Vienna Convention on Consular Relations.¹³ *Medellin* did not raise this Vienna Convention claim at his trial or on direct appeal, thus triggering state procedural default rules preventing him from raising the claim on collateral review.¹⁴ In related litigation after the United States had signed onto the Vienna Convention, the International Court of Justice (“ICJ”)¹⁵ issued an opinion in *Case Concerning Avena and Other Mexican Nationals* (“*Avena*”). *Avena* held that the Vienna Convention bound individual states of the United States to the treaty’s requirement to apprise prisoners of their right to speak to their consulate.¹⁶ The ICJ further held that certain Mexican nationals

¹¹ My emphasis is one of many possible perspectives on the decision. For example, in contrast to my approach, one commentator argues that *Medellin* is more about “the horizontal allocation of power between the executive and [the] legislat[ure] [than about the] vertical allocation of power between federal and state governments.” Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1198 (2008). Another commentator captures the richness of competing perspectives on *Medellin* by identifying three separate narratives informed by the decision: an internal/constitutionalist narrative, an external/internationalist narrative, and a transnational/intersystemic narrative. Margaret E. McGuinness, *Three Narratives of Medellin v. Texas*, 31 SUFFOLK TRANSNAT’L L. REV. 227 (2008). My focus here is most closely aligned with the internal/constitutionalist narrative. See *id.* at 234 (“The Internal/Constitutionalist narrative frames the issue of America’s interaction with international law from the inside looking out. It adopts a vocabulary reflecting the history, internal structures, and jurisprudential traditions of the Constitution.”).

¹² Despite eluding the attention of the press and public, the case has become something of a law professor’s darling. Well, perhaps “whipping boy” is more apt, since the affection applies not to its result, but for its endlessly fascinating legal issues. The two constitutional cases likely receiving the most press attention during that term were *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (interpreting the Second Amendment) and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (adjudicating the constitutionality of Congress’s suspension of the writ of habeas corpus for Guantanamo detainees). See generally Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES, Sept. 28, 2008, (Magazine), at 50, 56 (stating that although equally “important to defining our constitutional era” as *Boumediene*, *Medellin* “garnered little public attention”).

¹³ *Medellin v. Texas*, 128 S. Ct. 1346, 1354 (2008).

¹⁴ *Id.* at 1355.

¹⁵ The ICJ is established pursuant to the United Nations Charter to adjudicate disputes between member states. In this litigation, Mexico brought a claim against the United States, alleging violations within the United States of the Vienna Convention.

¹⁶ *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (Mar. 31), 2004 WL 2450913.

(including Medellín) were entitled to review and reconsideration of their state court convictions and sentences, despite their failure to comply with state procedural rules governing claim preservation.¹⁷ After this ICJ decision, President George W. Bush stated in a "Memorandum to the Attorney General" that the United States would "'discharge its international obligations' . . . 'by having State courts give effect to the decision.'"¹⁸

As one of the Mexican nationals named in the ICJ proceedings, Medellín had earlier been convicted and sentenced to death in Texas state court. Relying on the ICJ's decision and the President's Memorandum, Medellín applied for a writ of habeas corpus in Texas state court. He ultimately sought relief in the United States Supreme Court after the Texas Court of Criminal Appeals dismissed his application as an "abuse of the writ," citing his failure to timely raise his Vienna Convention claim.¹⁹

Affirming the Texas Court of Criminal Appeals, the United States Supreme Court ruled that Texas procedural default principles should yield neither to the ICJ judgment nor to presidential power as expressed in the President's Memorandum.²⁰ In so doing, the Court wended its way through abstract issues relating to the self-executing qualities in treaties, allocation of authority between supranational and domestic courts, the status of international law, and Justice Jackson's classic tripartite model of Executive authority in the United States.²¹

At bottom, though, the Court framed its ruling in the language of preemption and deference to state authority. First invoking

¹⁷ *Id.*

¹⁸ *Medellin*, 128 S. Ct. at 1353 (quoting Memorandum to the Attorney General (Feb. 28, 2005), Appendix to Petition for Writ of Certiorari at 187a, *Medellin*, 128 S. Ct. 1346 (06-984)). The President's Memorandum stated:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Id. at 1355 (alteration in original) (quoting Memorandum to the Attorney General, *supra*).

¹⁹ *Id.* at 1353.

²⁰ *Id.* The President's assertion of unilateral authority had a twist, in that he did not suggest that he himself would be subject to the international law mandate. See John Cerone, *Making Sense of the U.S. President's Intervention in Medellín*, 31 SUFFOLK TRANSNAT'L L. REV. 279, 287 (2008) (observing that in approaching the issue, President Bush wanted both to claim "authority to issue a command to state courts on the basis of an international legal obligation, while simultaneously rejecting any notion that he himself is bound by that obligation").

²¹ The Court used Justice Jackson's model in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

preemption rhetoric, the Court pronounced that the ICJ judgment “does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions.”²² Likewise, the Court confronted the President’s exertion of power as an attempt “to establish binding rules of decision that preempt contrary state law.”²³ In finishing off both power issues, the Court indulged a deference-to-state-prerogatives flourish. As to the international law issue, the Court observed that state procedural rules are so inviolable that even “basic rights guaranteed by our own Constitution do not have the effect of displacing [them].”²⁴ And state sovereignty’s strength is equally compelling in the face of Presidential power, which “cannot stretch so far” as to reach “deep into the heart of the State’s police powers and compel[] state courts to reopen final criminal judgments.”²⁵

Given this bombast, commentators were quick to characterize the decision as abdicating a remarkable degree of power to state courts. After all, the Court effectively allowed the law of an individual state to control whether to honor the United States’ treaty obligation, the judgment of an international tribunal, and a “memorandum” of the President of the United States.²⁶ To accomplish this, the Court intoned rule-like formalism: (1) the President had asserted a category of power absent from his list of constitutionally granted duties, and (2) international law unequivocally lacks the clout necessary to displace state procedural rules. Although such formalist thinking is typical of separation of powers cases,²⁷ one need not dig far beneath the surface of the formal analysis to find flexibility—flexibility enjoyed and controlled by federal courts. Before embarking on that excavation, however, I first describe my other case study—bankruptcy.

²² *Medellin*, 128 S. Ct. at 1367.

²³ *Id.* at 1368 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Medellin*, 128 S. Ct. 1346 (No. 06-984)).

²⁴ *Id.* at 1367; see also *id.* at 1363 (“[A]bsent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.”) (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 351 (2006) (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998))).

²⁵ *Id.* at 1372.

²⁶ See, e.g., Ahdieh, *supra* note 11, at 1231 (“[T]he State of Texas emerged as the critical decider of the domestic effects of international law.”); Posting of Tim Wu to Slate Convictions blog, <http://www.slate.com/blogs/blogs/convictions> (March 25, 2008, 6:19 PM) (stating that *Medellin* “boiled down, allows an individual state to put the whole United States in breach of a treaty, in defiance of both an international tribunal and the President’s order that the State obey the treaty”).

²⁷ See, e.g., Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47, 110–11 (2000) (reviewing separation of powers cases reflecting formalist reasoning).

B. Bankruptcy: Butner v. United States and Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.

By contrast to *Medellin*, the bankruptcy examples are less burdened with abstract issues of government structure. Like other choice of law decisions, however, the cases are nonetheless complex and their precise scope is vague. This complexity has spawned confusion about their relation to each other as well as to the doctrine of *Erie Railroad Co. v. Tompkins*.²⁸ For that reason, the bankruptcy cases match *Medellin* in their obscured meaning and their potential for vast consequence. Yet, while *Medellin* presents a story of inter- and intra-governmental political struggle, the bankruptcy cases offer a narrative rooted primarily in case law development within the federal system alone.

The bankruptcy tale begins with *Erie Railroad Co. v. Tompkins* and the uncertainty surrounding whether its mandated presumption in favor of state law governance has any role in bankruptcy. Two decisions in the wake of *Erie* suggested that it possessed a limited role in bankruptcy,²⁹ but the law review commentary reflects conflicting views on the subject. Some commentators opined that *Erie*'s state law presumption has limited or no force in bankruptcy proceedings (which occur on overwhelmingly federal terrain), while others argued that the state law foundation for rights adjudicated in bankruptcy casts a strong role for *Erie*.³⁰

²⁸ 304 U.S. 64 (1938).

²⁹ *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946), stated that "[i]n determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie* . . . has no such implication." *Id.* at 162 (citation omitted). Similarly, *Heiser v. Woodruff*, 327 U.S. 726 (1946), stated that "nothing . . . in *Erie* . . . requires a court of bankruptcy, in applying the statutes of the United States governing the liquidation of bankrupts' estates, to adopt local rules of law in determining what claims are provable, or to be allowed, or how the bankrupt's estate is to be distributed among claimants." *Id.* at 732.

³⁰ The early law review commentary pointed in different directions. Compare Vern Countryman, *The Use of State Law in Bankruptcy Cases (Part I)*, 47 N.Y.U. L. REV. 407, 410-11 (1972) (arguing that *Erie* does not apply in bankruptcy because the bankruptcy context presents a situation where Congress has acted), with Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1034-35 (1953) (arguing that since the Rules of Decision Act inspired *Erie* and since the Act applies in both diversity and non-diversity cases, *Erie* likely applies in bankruptcy).

More contemporary commentary has been similarly divergent. Compare Randolph J. Haines, *Federalism Principles in Bankruptcy After Katz*, 15 AM. BANKR. INST. L. REV. 135, 146 (2007) ("Because bankruptcy jurisdiction exists by virtue of the federal nature of the litigant—the estate—the *Erie* doctrine that applies in diversity cases does not directly apply."), with Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 641-92 (2004) (inventorying the reasons why *Erie* should be "honored" in bankruptcy as well as exploring the ramifications of this approach).

Presumably intending to inject clarity into the debate, the Supreme Court in *Butner v. United States*³¹ enunciated a preference for state law to prevail in conflicts with federal law, at least for issues implicating property rights. The *Butner* Court's specific language advised: "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."³²

In two subsequent cases, the Supreme Court affirmed *Butner*'s principle that state law controls the substance of claims adjudicated in bankruptcy. First, in 2000, the Court held that a bankruptcy court should not alter the burden of proving tax liability established by state law.³³ Then, in the 2007 decision *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*,³⁴ a unanimous Court sounded an endorsement of the *Butner* principle.

In *Travelers*, Travelers Casualty and Surety Co. had issued bonds guaranteeing obligations of Pacific Gas & Electric ("PG&E") under state worker's compensation laws. PG&E had indemnified Travelers in connection with these bonds, including in the indemnity agreement a promise to reimburse Travelers for attorneys' fees incurred in protecting or litigating Travelers' rights. Once PG&E filed a bankruptcy petition, Travelers incurred attorney's fees for protecting its rights and filed a proof of claim to recover those fees, invoking the contractual promise in the indemnity agreement. The lower courts denied the claim, citing a federal common law rule that bankruptcy courts should not award attorney's fees for litigating matters that "'involve . . . issues peculiar to federal bankruptcy law.'"³⁵ Reversing the lower courts, the Supreme Court rejected this attorneys' fee rule.

The principle of deference to state law controlled the *Travelers* Court's reasoning. Observing that bankruptcy courts must "consult state law in determining the validity of most claims,"³⁶ the Supreme Court observed that federal courts must "presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed."³⁷ Since neither the lower courts nor PG&E offered any reason why this presumption should not apply for attorneys' fees "incurred litigating issues of federal bankruptcy

³¹ 440 U.S. 48 (1979).

³² *Id.* at 55.

³³ *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000).

³⁴ 549 U.S. 443 (2007).

³⁵ *Id.* at 447 (quoting *In re Fobian*, 951 F.2d 1149, 1153 (9th Cir. 1991)).

³⁶ *Id.* at 450.

³⁷ *Id.* at 452.

law,”³⁸ the Court ruled that the contract provision allowing the fees could support a valid claim—unless state law deemed the provision unlawful. Opening the door for other avenues of federal regulation, however, the Court stated “we express no opinion with regard to whether . . . other principles of bankruptcy law might provide an independent basis for disallowing Travelers’ claim for attorney’s fees.”³⁹

Through this final caveat, the *Travelers* Court retained federal judicial control of the legal principles governing the choice of law question in the case, just as it did in *Medellin*. Under *Travelers*, a federal judge finding the circumstances appropriate can deem the federal interest sufficiently strong as to avoid state law regulation. Accepting this invitation, some lower courts following *Travelers* have even disallowed attorneys’ fees in light of a strong bankruptcy policy that trumps the presumption in favor of state law.⁴⁰ Moreover, recent United States Supreme Court statements about the affirmative nature and wide reach of the bankruptcy power may fuel this tendency to invoke federal power at the expense of state law.⁴¹ Read together with the post-*Travelers* experience in the lower courts, these Supreme Court statements suggest a malleable **standard** for the choice of law question presented in *Travelers*. This approach seems to contrast with the formal **rule** invoked to resolve the choice of law question in *Medellin*. The next section investigates whether these characterizations—**standard** and **rule**—carry a meaningful distinction in this context.

³⁸ *Id.* at 452–53.

³⁹ *Id.* at 456.

⁴⁰ Richard J. Corbi, *Update: Postpetition Attorney’s Fees Following the Supreme Court Decision of Travelers Casualty and Surety Co. of America v. Pacific Gas and Electric Co.*, 17 NORTON J. BANKR. L. & PRAC. 341 (2008) (surveying cases and noting that some courts are disallowing attorneys’ fees even in light of the strong presumption in *Travelers*).

⁴¹ In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the Supreme Court held that government defendants may not avail themselves of a sovereign immunity defense in a case arising under bankruptcy law. *Id.* at 375–77. More broadly read, the case suggests a new robust reading for the Constitution’s grant of power to Congress to create uniform bankruptcy laws. Inaccurate, this reading of the Constitution could restrict or undermine *Butner*’s deference for state law. As one commentator argued, if Congress’s power to create uniform bankruptcy laws allows the type of insult to state prerogatives resulting from abrogating sovereign immunity, then it certainly allows “adoption of a federal definition of property for fraudulent transfer purposes.” Haines, *supra* note 30, at 148. Presumably the same applies to the deference to state contract law exhibited in *Travelers*.

The Supreme Court recently granted review in a case that promises to interpret the intended scope of *Katz*, *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 761 (2008).

II. THE HYBRID STANDARDS OF *MEDELLIN* AND *BUTNER/TRAVELERS*

Medellin and *Butner/Travelers* hold powerful consequences for litigants seeking access to a federal court remedy. Under *Medellin*, parties with claims implicating international law will have more difficulty gaining access to domestic United States courts to litigate.⁴² Likewise, those trying to assert claims relevant to the Bankruptcy Code policies, but in tension with state-created property rights, may find that the *Butner/Travelers* principle disqualifies a favorable federal court remedy. Given this effect of *Medellin* and the bankruptcy cases, one can easily conjecture about the unstated ulterior motives that controlled the decisions, but were unrelated to the technical procedural issues dominating the Court's express reasoning. One might argue, for example, that the *Medellin* Court acted out of concern with losing control to international organizations beyond the reach of United States sovereignty. Likewise, one might attribute to the *Travelers* Court a concern with preserving state law's preference for creditor rights and freedom of contract principles.

While crucial to understanding the full import of the cases, unstated motivations or ideologies are not my primary concern here. Instead, I focus on the narrow methodological question of how the Court handled the choice of law inquiries, evaluating how the Court accommodated diverse legal principles from different sovereigns and whether the Court's approach empowered or undercut the federal judiciary. To that end, I use this part to investigate whether the cases reflect a **rule** or **standard** approach to decisionmaking⁴³ and whether the particular approach used facilitated federal judicial control of the subject matters.

A. Rules and Standards

Scholars define a "rule" as a "legal directive" requiring a decisionmaker to reach a certain result upon finding the presence of certain triggering facts.⁴⁴ Some emphasize that rules "entail an

⁴² Craig Jackson, *The Anti-Commandeering Doctrine and Foreign Policy Federalism—The Missing Issue in Medellin v. Texas*, 31 SUFFOLK TRANSNAT'L L. REV. 335, 335 (2008) (observing that *Medellin* "has made it much more difficult for issues involving international obligations of the United States to be litigated in domestic courts, even where the President orders judicial resolution of those matters").

⁴³ I am indebted to Professor Craig Green for suggesting this analysis.

⁴⁴ Kathleen M. Sullivan, *The Supreme Court, 1991 Term, Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (describing a rule as binding "a decisionmaker to respond in a determinate way to the presence of delimited triggering facts"); see, e.g., Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381 (1985) (conceptualizing legal rules as "a series of directives," where each directive has "a 'trigger' . . . and a 'response' that requires or authorizes a legal consequence when that [trigger] is present").

advance determination of what conduct is permissible.”⁴⁵ Standards, by contrast, tend to require that the decisionmaker apply a “background principle or policy” to a set of facts before rendering a binding decision about the facts.⁴⁶ In this way, standards allow the decisionmaker to decide “[whether certain] conduct is permissible” after the conduct has occurred and the court has evaluated the conduct’s effect.⁴⁷

Standards implement functional decisionmaking, often associated with balancing tests and reasoning by reference to the purposes underlying legal directives.⁴⁸ Rules, by contrast, enable formalistic decisionmaking, associated with “bright-line boundaries” and “categorical formulas.”⁴⁹ In recent years, the rule-based approach to decisionmaking has gained many proponents,⁵⁰ particularly for issues bearing on a court’s jurisdiction.⁵¹ Proponents argue that rules reduce complex reasoning and constrain discretion, thereby promoting uniformity, efficiency, predictability, and even-handed justice.

B. Medellín: A Rule Dissolves Into a Standard

Medellin rendered an unqualified holding that both the ICJ’s *Avena* decision and the President of the United States lacked power to establish “‘a binding rule[] of decision that preempt[s] contrary state law’”⁵² on the finality of criminal judgments. Of course, the Court’s language and embrace of the tri-partite *Youngstown* test suggested that the Court would be willing to qualify its position and defer to Congress if Congress were to pass specific legislation executing the terms of the Vienna Convention and delineating the effect of the ICJ

⁴⁵ Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992). Kaplow’s analysis is cited widely within legal scholarship.

⁴⁶ Sullivan, *supra* note 44, at 58; *see also* Mark D. Rosen, *Nonformalistic Law in Time and Space*, 66 U. CHI. L. REV. 622, 623 (1999) (using the term “nonformalistic law” as synonymous with standards and defining standards as abstract concepts that “refer to the ultimate policy or goal animating the law”).

⁴⁷ Kaplow, *supra* note 45, at 560.

⁴⁸ *See* Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 951 (2004) (describing characteristics of functionalism).

⁴⁹ Sullivan, *supra* note 44, at 59.

⁵⁰ *See, e.g.*, Little, *supra* note 27, at 107–09 (citing sources to support the proposition that formalism is gaining popularity).

⁵¹ *See, e.g.*, *In re Lopez*, 116 F.3d 1191, 1194 (7th Cir. 1997) (arguing that jurisdictional rules should be “simple and precise so that judges and lawyers” can focus on the dispute’s merits). For an argument that the rule approach is better than the standard approach for determining which forum should adjudicate a hybrid law case, *see* John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 192 (2006).

⁵² *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008) (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Medellin*, 128 S. Ct. 1346 (No. 06-984)).

decision.⁵³ But this suggestion did not undermine the bright-line, formal veneer of *Medellin*'s holding. The Court represented that the conflict was unquestionably and simply resolved by state procedural default law, unless clearly trumped by Congress. In other words, the Court purported to resolve the power struggles in the case with a formal **rule**.

Viewing *Medellin* against the background of existing law governing procedural default in state criminal cases, one unearths both flexibility and complexity. Considering the myriad preexisting exceptions to state procedural default principles in federal case law, one begins to see that the Court left significant room for its own control of legal doctrine in future cases. From this perspective, the Court deployed a methodology more resembling a standard than a rule.

Evidence of the Court's control appears first in its orientation toward the issues in *Medellin*. Not only did the Court assert itself against the executive branch and against an international tribunal, but it took for itself the task of deciding whether or not the procedural bar should be effective. Having decided that the procedural bar in *Medellin* should be treated like any other effective state procedural bar, the Court left open the possibility that in future disputes of this kind, federally defined standards might prevent a state procedural rule from operating as a bar. How is this possible? Under the independent and adequate state ground doctrine undergirding the procedural bar rule, federal law governs whether a federal court honors a state procedural bar. Thus, in future cases, a panoply of federal principles will inform whether the procedural bar stands as an obstacle to direct United States Supreme Court review of a state criminal conviction or as an obstacle to federal habeas corpus review.⁵⁴

In the posture of both direct and habeas review, the federal court makes its own determination whether to give effect to a state procedural bar.⁵⁵ As an initial matter in both contexts, the federal court must characterize the state rule: is it "procedural" or

⁵³ For specific language, see *Medellin*, 128 S. Ct. at 1369 (stating that Congress could "enact implementing legislation approved by the President").

⁵⁴ See, e.g., Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 245 n.3 (2003) (observing that federal standards for "the direct-review and habeas-review incarnations of the independent and adequate state grounds doctrine are [similar, but] not precisely congruent").

⁵⁵ See, e.g., Martin A. Rogoff, *Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 406, 424 (2006) (observing that the United States Supreme Court and Congress have "carefully crafted and fine-tuned the procedural default doctrine").

“substantive”? It is federal law that governs this characterization,⁵⁶ and the process of making the substantive/procedural decision is notoriously slippery and indeterminate.⁵⁷ Indeed, the process of sorting rules according to the substantive/procedural characterization is alone sufficient to transport an area of law from bright-line rulemaking to a process of creating standards capable of endless manipulation.

Even if the state rule is unquestionably procedural, the federal doctrines governing procedural defaults include much discretion, rendering the decisionmaking principles even more standard-like. For cases coming to the United States Supreme Court on direct review, the Court has created a complex body of laws governing the circumstances under which the independent and adequate state ground doctrine applies. In this enterprise, the Court “applies its own standards in making [the] . . . inquiry, and is not precluded from reaching its own conclusion.”⁵⁸ For example, the Court may scrutinize a state procedural ground to ensure that it is not “arbitrary or a mere device to prevent . . . review”⁵⁹ and that it has been applied “evenhandedly to all similar claims.”⁶⁰ Moreover, the United States Reports are replete with examples where, on direct review of a state court decision, the Supreme Court refuses the shackles of state court factual determinations that could foreclose federal constitutional claims.⁶¹

For cases coming to federal court on habeas, the procedural bar doctrine is governed by a federal “cause and prejudice” standard. In *Wainwright v. Sykes*,⁶² the Court held that a habeas petitioner must abide the consequences of failure to comply with a state procedural rule unless she shows “cause” for having failed to raise the claim properly in state court and actual “prejudice” resulting from the

⁵⁶ Cf. *Bousley v. United States*, 523 U.S. 614, 620 (1998) (holding that federal retroactivity law applies only to procedural rules and that the federally determined “distinction between substance and procedure is an important one in the habeas context”).

⁵⁷ See, e.g., *Sampson v. Channel*, 110 F.2d 754 (1st Cir. 1940) (concluding that burden of proof law is substantive for *Erie* doctrine purposes and procedural for horizontal conflict of law purposes); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 726 (1974) (observing that substance and procedure are closely intertwined); cf. Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1841 n.113 (2005) (listing sources illuminating the problems with characterization within choice of law); Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 372–73, 387 (1996) (explaining how the characterization process creates many options for disposition of a controversy).

⁵⁸ EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 222 (9th ed. 2007).

⁵⁹ *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

⁶⁰ *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).

⁶¹ See GRESSMAN ET AL., *supra* note 58, at 228–31 (citing cases).

⁶² 433 U.S. 72 (1977).

failure to enjoy the underlying federal right. Of course, federal law governs the questions whether “cause” or “prejudice” are established. Moreover, even if a habeas petitioner fails to make the cause and prejudice showing, the petitioner can avoid the procedural default by satisfying a federal standard for actual innocence.⁶³ Unlike in other areas of habeas jurisprudence, Congress has been restrained in its gloss on the procedural bar standard: the Anti-Terrorism and Effective Death Penalty Act of 1996 left the cause and prejudice standard largely untouched, although the statute does create special federal rules for certain state death penalty cases.⁶⁴ Thus, Congress left for federal habeas courts nearly the same latitude in applying state procedural rules as the Supreme Court enjoys on direct appeal. With this latitude comes discretion and control, which enable federal courts to turn what appears as a rigid rule into a flexible standard.

C. Bankruptcy Cases: A Standard Lives Up to its Flexibility Potential

By contrast with the apparent rule-like formality of *Medellin*, *Travelers* (and its predecessor *Butner*) enunciated an open-ended principle, easily characterized as a **standard**. Both *Travelers* and *Butner* invite bankruptcy courts to deviate from state law where “some federal interest requires a different result.”⁶⁵ What kind of federal interest? How different a result? To answer those questions, a bankruptcy court is left on its own—with only underlying policies of the Bankruptcy Code to guide its deliberation. The result for courts is broad flexibility, enabling them to generate a motley assortment of hybrid legal principles. As outlined above, this flexibility is reflected in lower court applications of *Travelers*, with some courts concluding that a federal interest justifies deviating from the mandate to apply state law governing attorney’s fees awards.⁶⁶

With or without *Butner* and *Travelers*, hybrid law is no stranger to bankruptcy. In fact, bankruptcy is among the most state-law laden of

⁶³ See *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (explaining that federal court habeas review must honor the state court’s procedural bar unless the petitioner shows that the federal error that went uncorrected in state court “probably resulted in the conviction of one who is actually innocent”). The Supreme Court also generated another apparent exception in *Lee v. Kemna*, 534 U.S. 362 (2002), when it allowed a habeas petitioner to avoid a procedural bar because the state court had indulged an “exorbitant application of a generally sound rule.” *Id.* at 376.

⁶⁴ LAURA E. LITTLE, *FEDERAL COURTS: EXAMPLES AND EXPLANATIONS* 319 (2006) (reviewing the effect of the Anti-Terrorism and Effective Death Penalty Act of 1996 on the procedural bar rules).

⁶⁵ *Butner v. United States*, 440 U.S. 48, 55 (1979); see *Travelers Cas. & Sur. Co. of America v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 456 (2007) (suggesting that “principles of bankruptcy law” would justify deviating from state law mandate).

⁶⁶ See *supra* note 40 and accompanying text for discussion of this case law.

the federal statutory schemes. Many, many Bankruptcy Code sections depend for scope, definition, and meaning on state law, and—in many instances—explicitly embrace state law within the plain language of the statute.⁶⁷ One would think that bankruptcy courts and scholars are acclimated to the world of hybrid law, yet confusion still surrounds the question of how each sovereign should influence the rules applied in bankruptcy.

For the task of mapping areas of state and federal domain, legal thinkers struggle with general questions about the proper scope of the Constitution's bankruptcy power.⁶⁸ For some, a restrictive view of the bankruptcy power leaves little opportunity for a federal interest to displace state law.⁶⁹ For others, the Constitution's bankruptcy power is sufficiently broad as to authorize bankruptcy courts to create a common law of bankruptcy, which preempts wide swaths of potentially applicable state law.⁷⁰

⁶⁷ See, e.g., 11 U.S.C. § 109(c)(2) (2006) (eligibility for Chapter 9 limited to entities authorized by state law); *id.* § 362(b)(2)(D) (automatic stay exception for suspension of professional licenses); *id.* § 365(c)(1)(A) (“applicable law” excuses non-debtor from accepting substituted performance); *id.* § 365(f)(1) (trustee may assume and assign notwithstanding “applicable law”); *id.* § 510(a) (subordination agreements enforceable as under “applicable nonbankruptcy law”); *id.* § 522(b)(2) (exemptions under “state law”); *id.* § 522(c)(1) (notwithstanding “applicable nonbankruptcy law,” exempt property is liable for child support); *id.* § 522(f)(3) (protecting certain liens from avoidance); *id.* § 526(c)(3), (5) (reference to debt relief agencies); *id.* § 541(a) (reference to all debtor's legal and equitable interests in property); *id.* § 544(a) (trustee's strong arm power depends on state law priorities); *id.* § 544(b) (trustee subrogates to avoiding power of unsecured creditor under “applicable law”); *id.* § 546(b)(1) (trustee's avoiding powers are subject to limitations in “generally applicable law”); *id.* § 547(c)(1) (defining perfection by reference to “applicable law”); *id.* § 548(d)(1) (defining when transfer is made, in terms of “applicable law”); *id.* § 549(c) (protection of bona fide purchaser in terms of “applicable law”); *id.* § 552(b)(1) (reference to post-petition reach of security interest in terms of “applicable nonbankruptcy law”); *id.* § 1126(b)(1) (acceptance of plan, in compliance with “applicable nonbankruptcy law”). My thanks to Professor Margaret Howard for her assistance with compiling this list.

⁶⁸ See Haines, *supra* note 30, at 148 (arguing that the Supreme Court has recently signaled a broader reading of the Bankruptcy Clause); Lipson, *supra* note 8, at 611–14 (describing the dearth of constitutional theory useful for guiding difficult bankruptcy decisions); Plank, *supra* note 30, at 647 (arguing for a limited reading of bankruptcy power, under which Congress may not alter “the substantive legal relationship between a debtor and another party to the extent that the relationship is not a debtor-creditor relationship”).

⁶⁹ See Plank, *supra* note 30, at 647.

⁷⁰ See Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 69–78 (2006) (explaining the justification for federal common law in bankruptcy). Levitin cites the following three examples of federal common law making in bankruptcy: *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005) (substantive consolidation of debtor and subsidiaries); *In re Kmart Corp.*, 359 F.3d 866, 870–71 (7th Cir. 2004) (standards for critical vendor motions); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 602–03 (Bankr. D. Del. 2001) (treatment of non-debtor releases).

One might argue that the Supreme Court's approach in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), supports a broad reading of the bankruptcy power. For further discussion of *Katz*, see *supra* note 41.

Bankruptcy's unsettled constitutional status is reflected in court decisions about whether a "federal interest" ever trumps the usual deference to state law. Perhaps nowhere are the conflicting responses more pronounced than in analyses of the question whether bankruptcy courts are constrained by state law in disposing of horizontal choice of law problems. When confronted with a clash of state laws governing a particular question, some bankruptcy courts see the bankruptcy power as broad enough to justify creating federal principles. Other bankruptcy courts believe that the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*⁷¹ constrains them.

Handed down close on the heels of *Erie Railroad Co. v. Tompkins*, *Klaxon* established that federal diversity courts must apply the state conflict of law rules of the forum state.⁷² Those courts concluding that this principle controls in bankruptcy reason that, when a bankruptcy court determines that state law must govern a question, the court must apply the conflict of law rules of the forum state to ascertain **WHICH** state law governs.⁷³ Others conclude that, under the *Butner/Travelers* standard, bankruptcy presents a unique federal context for choice of law issues and that bankruptcy courts need not confine themselves to the same choice of law mandates as diversity courts.⁷⁴ According to this view, bankruptcy's focus on uniform and efficient resolution of a debtor's affairs provides an important federal interest that counsels bankruptcy courts to use federal—not state—choice of law rules. Not surprisingly, courts following this reasoning pursue different

⁷¹ 313 U.S. 487 (1941).

⁷² *Id.* at 496. The *Klaxon* Court reasoned: "Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based." *Id.* (citation omitted).

⁷³ Many recent courts have assumed that the *Klaxon* approach applies in bankruptcy, without suggesting any modification to the choice of law analysis to incorporate any special concerns of bankruptcy. *See, e.g.,* Amtech Lighting Servs. Co. v. Payless Cashways, Inc. (*In re* Payless Cashways), 203 F.3d 1081, 1084 (8th Cir. 2000) (using Missouri choice of law rules to determine which state law is applicable to the analysis of contract severability); Kaplan v. First Options of Chi., Inc. (*In re* Kaplan), 143 F.3d 807, 812 n.7 (3d Cir. 1998) (using Pennsylvania choice of law rules to determine which state law is applicable to contract claims); Carter Enters. Inc. v. Ashland Specialty Co., 257 B.R. 797, 801–02 (S.D. W. Va. 2001) (using West Virginia choice of law rules to determine which state law is applicable in successor liability case).

This view is consistent with language from *Butner*, stating that "[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Butner v. United States*, 440 U.S. 48, 55 (1979) (quoting *Lewis v. Mfrs. Nat'l Bank*, 364 U.S. 603, 609 (1961)).

⁷⁴ *See, e.g.,* *Conflict of Laws in Bankruptcy: Choosing Applicable State Law and the Appropriate (State or Federal?) Choice-of-Law Rule*, BANKR. L. LETTER, July 2001, at 1, 4 (arguing that the Supreme Court's decision in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946), suggests that bankruptcy courts are free to apply federal choice of law rules).

strategies.⁷⁵ Some take the view that bankruptcy courts should follow federal choice of law methodology, thought to be reflected in the *Restatement (Second) of Conflict of Laws*.⁷⁶ Other courts have determined that, although federal law governs horizontal choice of law questions in bankruptcy, a state's conflict of law rules will generally provide the content of that federal law.⁷⁷

We see then two examples of how the *Butner/Travelers* state law deference standard has risen to its potential for vesting wide latitude in federal courts. First, in applying *Travelers* itself, bankruptcy courts enjoyed the analytical freedom to disallow attorney's fees—a result in tension with *Traveler's* bottom line. Second, for the *Klaxon* question, courts have found justification for a variety of results: apply forum state choice of law rules, apply federal choice of law methodology, or apply federal law that incorporates state choice of law rules for its content. Viewing the discretion made possible under the *Butner/Travelers* standard, one wonders whether that discretion could translate into complete control over the subject matter. To that matter, I now turn.

D. Doctrinal Control versus Complete Control

Upon initial analysis, *Medellin* and *Travelers* illustrate reverse preemption, with federal courts yielding the legal rules applied in federal litigation to state law. Yet, as I just illustrated, the doctrinal frameworks within which federal courts will apply these state law

⁷⁵ Sometimes federal law provides a bankruptcy court with a statutory mandate as to which state's law to apply. For example, 28 U.S.C. § 959 (2000) provides that except as required under 11 U.S.C. § 1166 (2000), a trustee "shall manage and operate the property in his possession as such trustee . . . according to the requirements of the valid laws of the State in which such property is situated . . ." *Id.* § 959. The alternative strategies come into play where no federal statutory choice of law exists. The breakdown of various federal law strategies described here derive in part from the helpful analysis in Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 906–18 (2006).

⁷⁶ See, e.g., *Liberty Tool & Mfg. v. Vortex Fishing Sys., Inc.* (*In re Vortex Fishing Sys., Inc.*), 277 F.3d 1057, 1069–70 (9th Cir. 2002) (stating that federal courts in bankruptcy apply the *Restatement (Second) of Conflict of Laws*); *Novartis Crop Prot., Inc. v. Am. Crop Servs., Inc.* (*In re Am. Crop Servs., Inc.*), 258 B.R. 699, 703 (Bankr. W.D. Tenn. 2001) (applying the *Restatement (Second) of Conflict of Laws* in bankruptcy, because that is the choice of law approach under Tennessee and federal law).

⁷⁷ For example, the United States Court of Appeals for the Fifth Circuit has ruled that in resolving a state law issue, a bankruptcy court should apply the forum state's conflict of law rules or "may exercise its independent judgment and choose whatever state's substantive law it deems appropriate . . ." *Woods-Tucker Leasing Corp. of Ga. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 748 (5th Cir. 1981). On the other hand, the Fourth and Second Circuits follow forum choice of law rules unless an overriding or compelling federal interest dictates otherwise. See, e.g., *Bianco v. Erkins* (*In re Gaston & Snow*), 243 F.3d 599, 606 (2d Cir. 2001); *Compliance Marine, Inc. v. Campbell* (*In re Merritt Dredging Co.*), 839 F.2d 203, 206 (4th Cir. 1988) ("We believe . . . that in the absence of a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail . . .").

principles are federally defined and thus retain federal character. To be sure, states may influence case results in both contexts by changing the state laws designated for incorporation into federal litigation. But the flexible, standard-like quality of the federal gloss on the state laws in *Medellin* and *Travelers* suggest that a federal court could neutralize any changes in state law with a corresponding federal law maneuver.

I do not, however, want to overstate the reach of the federal judiciary's control of these subject matters. Factors mitigating federal court power deserve mention. To begin, both *Medellin* and *Travelers/Butner* leave open the possibility that Congress may jump in, enacting legislation that displaces federal judicially created rules. One should no doubt assume that the United States Supreme Court would approach this legislation with deference. This deference is likely qualified: several reasons suggest the Court would closely scrutinize the legislation's legitimacy. First, the Supreme Court has generally held for itself the prerogative of negotiating sensitive questions of "Our Federalism"—which include choice of law questions implicating the interplay between state and federal rules of decision.⁷⁸ While this prerogative is complicated and perhaps diminished in the foreign affairs context,⁷⁹ the Court's tone in protecting state sovereignty in *Medellin* suggests the prerogative is nonetheless present in the foreign affairs realm. Moreover, recent litigation over military tribunals for Guantanamo detainees suggests that the current Court casts a skeptical eye on congressional solutions balancing federal civil rights with foreign affairs matters.⁸⁰

At least for foreign affairs issues such as *Medellin*, the reach of federal judicial control is further circumscribed by actions of nonfederal entities, such as state and local actors. Scholars have observed how these nonfederal actors serve an increasingly important

⁷⁸ See, e.g., Craig Green, *Repressing Erie's Myth*, 96 CAL. L. REV. 595, 606–15 (2008) (discussing the federalism rationale of the choice of law mandate of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). See generally *Younger v. Harris*, 401 U.S. 37, 44 (1971) (discussing the judicially recognized doctrine of "Our Federalism," which is built on "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways").

⁷⁹ Cf. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (holding invalid under the Supremacy Clause a Massachusetts statute restricting Commonwealth agencies from doing business with Myanmar); *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (suggesting that Congress may enact laws under international agreements that might improperly infringe state power in other contexts).

⁸⁰ See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) (holding that the process provided in the Detainee Treatment Act of 2005 (DTA) is an inadequate substitute for writ of habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95 (2006) (rejecting the argument that Authorization for Use of Military Force (AUMF) or DTA provided adequate authority under the Constitution for the President to convene a military commission to try Hamdan).

role in developing law for the international arena.⁸¹ As views have changed about the appropriate regulatory sphere for international, transnational, national, state, and local authorities,⁸² these entities have interacted more with each other.⁸³ Events surrounding *Medellin* illustrate this interaction. Indeed, at least two states unilaterally capitulated to the International Court of Justice's *Avena* decision: Texas ultimately agreed to follow *Avena* for cases subsequent to *Medellin*,⁸⁴ and Oklahoma made clear its intention to defer to *Avena*'s ruling on procedurally defaulted Vienna Convention claims.⁸⁵

However significant these examples are in evaluating the true efficacy of federal judicial rulings, one must remember that state and local government action cannot literally negate the doctrinal law promulgated by the federal judiciary.⁸⁶ The Supremacy Clause remains in effect. Yet the federal judiciary's decision to incorporate state law into federal doctrine does give rise to hybrid law that may itself take on unintended form and meaning. Just as they may nullify changes in state law, federal courts remain free to modify federal doctrine in response to unintended meaning created when state and federal principles mix. In practice, though, the usual process of inertia leaves doctrine intact unless new developments motivate courts to action.

⁸¹ See, e.g., Ahdieh, *supra* note 11, at 1187–88 (“States and localities are increasingly engaged with foreign authorities and international questions.”).

⁸² See, e.g., Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1576 (2006) (reframing the debate about use of foreign law in light of the reality that “[s]tates and localities—through city councils, state legislatures, national organizations of local officials, and courts—serve as both importers and exporters of law”).

⁸³ See generally Ahdieh, *supra* note 11, at 1192–98 (reviewing examples of “sub-national” involvement such as actions taken by states in response to human right atrocities in Sudan, Massachusetts legislation barring state entities from purchasing goods or services from companies doing business in Burma, and the events leading up to *Medellin v. Texas*).

⁸⁴ See Editorial, *Texas's Disdain*, WASH. POST, Aug. 8, 2008, at A16 (reporting that Texas agreed “to support federal court review for some of the other Mexican nationals on death row”); Posting of Julian Ku to *Opinio Juris* Blog, *Texas Agrees to Sort of Comply with ICJ's Avena Judgment . . . But It Will Go Ahead and Execute Medellin Anyway*, <http://opiniojuris.org/2008/08/05/texas-agrees-to-sort-of-comply-with-icjs-avena-judgment-but-it-go-ahead-and-execute-medellin-anyway/> (Aug. 5, 2008, 12:01 AM EDT) (quoting a statement from a Texas brief to the United States Supreme Court promising that “‘as an act of comity, if any [individual subject to the *Avena* decision] should seek such review in a future federal habeas proceeding, the State of Texas will not only refrain from objecting, but will join the defense in asking the reviewing court to address the claim of prejudice on the merits’”).

⁸⁵ In his concurrence in *Medellin*, Justice Stevens reported that the Oklahoma Governor had commuted the death sentence for another defendant subject to the ICJ's *Avena* decision, citing the importance of the Vienna Convention. *Medellin v. Texas*, 128 S. Ct. 1346, 1375 n.4 (2008) (Stevens, J., concurring).

⁸⁶ See Ahdieh, *supra* note 11, at 1197 (“[T]he dominant position of the federal government in the hierarchy of foreign affairs and international law remains in place.”).

The result is a blend of legal rules with alternating strata of state and federal principles. The strata marry over time, creating a new entity. The next section takes up the questions whether this process of creating federal/state hybrid standards brings identifiable benefits and problems as well as whether this hybrid lawmaking carries lessons for other legal contexts.

III. THE CONSEQUENCES OF HYBRID LAWMAKING: LESSONS FOR OTHER CONTEXTS?

In disposing of the legal issues in *Medellin* and *Travelers*, the United States Supreme Court chose neither affirmative nor reverse preemption.⁸⁷ Instead, one might characterize the Court's approach as "multilateralist," since the Court integrated the concerns of more than one interested entity.⁸⁸ Using this multilateralist approach, the Court acted consistently with the default rule for preemption analysis, which presumes that federal and state law can operate concurrently.⁸⁹ This presumption in favor of concurrent power foreshadows not only the ubiquity of federal and state choice of law issues in our federalist legal system,⁹⁰ but also the many instances where federal courts have resolved these clashes by developing hybrid law. *Medellin* and *Travelers* are in fact part of a long history of hybrid lawmaking in federal courts.

In this part, I first describe other areas where federal courts have developed hybrid law and explore the distinction between combining state with federal regulation and combining domestic with foreign or international regulation. Mindful of this distinction, I then review general arguments concerning the wisdom and methodologies of hybrid lawmaking, including thoughts on what *Medellin* and *Travelers* contribute to these arguments. I conclude by examining

⁸⁷ Under the framework of Robert Schapiro, one might say that the Court rejected "monophonic preemption" analysis in favor of "polyphonic federalism." See, e.g., Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 812 (2008) (contrasting "dual federalism," which draws strict lines between state and federal spheres of authority, and "polyphonic federalism," which "understands state and federal power as largely concurrent"). For the purposes of *Medellin*, this analysis focuses on the decision to give effect to state procedural default rules in federal court habeas proceedings as well as the decision to give effect to state procedural default rules in the face of an international treaty obligation as interpreted by a federal entity—the President of the United States. See *Medellin*, 128 S. Ct. at 1348–52.

⁸⁸ See Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 785 (2008) (using term "multilateralist" in evaluating preemption questions).

⁸⁹ See Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 75–76 (2007) (discussing default presumption in favor of "concurrency").

⁹⁰ See, e.g., Clermont, *supra* note 6, at 4 ("[E]very actor, public or private, who faces a legal question in a federal system must first resolve this question of vertical choice of law.").

some of the lessons of this study for the debate raging in case law and academic literature about using foreign or international law in deciding domestic disputes.

A. Existing Contexts for Hybrid Law

Federal court jurisprudence brims with examples of hybrid law. Federal courts seem to generate hybrid law without regard to the main source of legal authority governing a dispute: federal court-made common law, federal statutory law, federal constitutional law, and international law have all provided a springboard for hybrid lawmaking. In most instances, federal courts mix federal and state law. In creating federal court-made common law, the Supreme Court has sometimes incorporated state law only for its content, emphasizing that the overriding character of the common law is federal.⁹¹ The Court has also followed this approach of borrowing state law content when adjudicating issues relevant to a federal statutory scheme.⁹² For other federal statutory contexts, federal courts have relied on state law to fill interstices in the statutory scheme without explicitly delineating whether they intend to incorporate state law as a whole or to use state law merely as a source of useful principles. Currently, confusion regarding this type of incorporation surrounds questions about successor liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").⁹³ In related contexts, federal cases have also manufactured hybrid schemes to give effect to a decision by Congress to regulate against the background of state corporate law.⁹⁴

⁹¹ See, e.g., *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671–78 (1979) (resolving issue of property possession by integrating state law regarding property rights into federal common law rules governing the legal effect of changes in a stream's location).

⁹² See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729–30 (1979) (using state law to provide content of federal common law in the administration of certain federal loan programs); *United States v. Brosnan*, 363 U.S. 237, 240–42 (1960) (incorporating state law governing divestiture of federal tax liens into the content of federal common law in order to accommodate competing consideration of federal uniformity and well-established state procedures); *De Sylva v. Ballentine*, 351 U.S. 570, 580–81 (1956) (borrowing from state law to decide whether illegitimate children should be allowed to exercise the federal right of children to renew their deceased parents' copyrights).

⁹³ 42 U.S.C. §§ 9601–9675 (2000). In *United States v. Bestfoods*, 524 U.S. 51 (1998), the United States Supreme Court left open the question whether state law or federal common law should provide the rules of successor liability under CERCLA. *Id.* at 63, n.9. Although the circuits are split on the issue, several have incorporated state law to provide the governing legal rules. Michael Carter, Comment, *Successor Liability under CERCLA: It's Time to Fully Embrace State Law*, 156 U. PA. L. REV. 767, 791–800 (2008) (analyzing the circuit split and reporting that the First, Second, Sixth, and Eleventh Circuits apply state law).

⁹⁴ See, e.g., *Bestfoods*, 524 U.S. at 63 (noting that many federal statutory schemes give "no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute'" (quoting *Burks v. Lasker*, 441 U.S.

Similarly, the Supreme Court embraced hybrid lawmaking for federal tax lien disputes, where Congress had authorized tax liens within the rubric of state property law. Under the Supreme Court tax lien cases, state law determined the nature of the property interest possessed, but federal law determined whether that interest was ““property” or “rights to property” within the compass of the federal tax lien legislation.”⁹⁵

Constitutional due process jurisprudence mirrors the alternating strata of state and federal laws found in these tax lien cases. While reserving to itself the prerogative of enunciating what procedures may be due where a state has deprived a person of liberty or property, the Supreme Court has repeatedly punted the question whether an individual possesses a property or liberty interest worthy of protection under federal constitutional standards. That issue—the existence of a liberty or property interest—is resolved by reference to state law.⁹⁶ Yet federal law informs how the Court interprets state law on the matter, often providing federal interpretative constraints that undermine the plaintiff’s success in asserting a constitutional claim.⁹⁷

471, 478 (1979)).

⁹⁵ *United States v. Craft*, 535 U.S. 274, 278–79 (2002) (quoting *Drye v. United States*, 528 U.S. 49, 58 (1999)) (holding that the rights of tenants by the entirety under state law are subject to the federal tax lien statute); *Drye v. United States*, 528 U.S. 49, 58 (1999) (holding that a disclaimer filed by an heir under state inheritance law did not defeat a previously filed federal tax lien on the heir’s inheritance and that the inheritance was “‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation”); see also William H. Baker, *Drye and Craft—How Two Wrongs Can Make a Property Right*, 64 U. PITT. L. REV. 745, 745, 781–82 (2003) (arguing that the Supreme Court’s approach to hybrid federal/state analysis in tax lien cases allows federal law to dominate).

⁹⁶ See, e.g., *Paul v. Davis*, 424 U.S. 693, 710 (1976) (explaining that liberty and property interests enjoy “constitutional status by virtue of the fact that they have been initially recognized and protected by state law”); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“[P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits . . .”).

In a related context, the Supreme Court has held that for the purpose of determining municipal liability under 42 U.S.C. § 1983, state (and local) law determines who is a policymaking official. See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). This instance of hybrid lawmaking is analytically akin to the due process jurisprudence because the impetus for deferring to state law is federalism’s respect for state sovereignty, but the maneuver can result in the state tying its own noose—that is, the specifics of state law establish that federal liability attaches for state misconduct.

⁹⁷ See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (explaining that when evaluating whether state law creates an entitlement amounting to a property interest, Supreme Court cases have recognized that “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion”).

Another example of hybrid lawmaking in the due process context concerns punitive damages. In some cases, the Supreme Court has incorporated certain state law principles to give substance to its jurisprudence. See, e.g., *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991) (citing with approval state-law generated *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (1989),

As with the issues in *Medellin* and *Travelers*, one wonders whether the distinct state and federal analytical layers are melding over time, creating unique concepts of property and liberty for due process purposes.

And, finally, there is precedent for hybrid lawmaking outside the usual context of federal/state power sharing. Most recently in *Sosa v. Alvarez-Machain*,⁹⁸ the Supreme Court invited lower federal courts to use the federal Alien Tort Statute to embrace rules from the law of nations.⁹⁹ Like *Medellin* and *Travelers*, *Sosa* shares a common thread with the federal common law cases, interstitial statutory cases, and constitutional due process cases: in all these contexts, federal courts retained dominance in determining the extent to which non-federal law influences a dispute's disposition. As a decision implicating international law, however, *Sosa* likely engendered more passionate criticism than hybrid lawmaking cases confined to domestic federal and state law.¹⁰⁰ To this issue, I now turn.

B. State/Federal Hybrids versus Domestic/Nondomestic Hybrids

As any regular reader of Supreme Court opinions and law review commentary can readily discern, the integration of international and transnational legal principles into domestic law strikes delicate nerves. Critics of the practice are loud, if not plentiful.¹⁰¹ Even

factors in evaluating the fairness of a punitive verdict under the due process clause). On the other hand, some scholars have found that the Court's attempt to regulate punitive damages has been so heavy handed as to amount to "partial federalization" of punitive damages law. See Issacharoff & Sharkey, *supra* note 2, at 1421.

⁹⁸ 542 U.S. 692 (2004).

⁹⁹ *Id.* at 714–15.

¹⁰⁰ See, e.g., *id.* at 739–50 (Scalia, J., concurring in part and concurring in the judgment) (criticizing majority opinion); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 154, 170–76 (critiquing *Sosa*'s majority opinion as "under-theorized," "muddled," and "tentative"); Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in Sosa v. Alvarez-Machain*, 2004 CATO SUP. CT. REV. 209, 231–43 (criticizing *Sosa*'s majority opinion on several bases, including separation of powers grounds).

¹⁰¹ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 622 (2005) (Scalia, J., dissenting) (arguing that foreign law can make opinions of Americans "essentially irrelevant"); *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring) (likening use of foreign law to "moods, fads, or fashions"); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM J. INT'L L. 57, 57–58 (2004) (criticizing use of international law as source of constitutional interpretation); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 907–09 (2005) (arguing that foreign sources of law should not be used in constitutional interpretation except in specific categories of cases); see also Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269 (2003) (emphasizing negative aspects of drawing on foreign sources of law in creating domestic law).

members of the 109th Congress sought to hog-tie federal courts, preventing them from considering international materials and materials from other countries.¹⁰² Explanations for the extreme tone characterizing the critics' message range from psychological analysis (e.g., objecting lawmakers and judges are displacing their displeasure with the general course of constitutional jurisprudence) and fear-mongering (e.g., the practice undermines the status of the United States in the world) to political theory (e.g., liberal democracy will die if the practice flourishes).

Although federalism can also serve as a lightning rod for debate, such enflamed rhetoric is notably absent when courts mix federal and state law. The *Medellin* decision illustrates this contrast. On one hand, the Court went to great lengths to justify its decision that federal power should not lightly yield to rulings of international tribunals and ratified treaties lacking clear language executing their terms. On the other hand, the Court treated as incontrovertible federal authority's embrace of state procedural bar rules, described as deeply embedded in "the heart of the State's police powers."¹⁰³

The contrasting reactions to mixing federal and state law, on one hand, and mixing domestic law with foreign and international law, on the other, is hardly surprising. Legal culture and practice,¹⁰⁴ as well as constitutional text,¹⁰⁵ relating to the two contexts are dramatically different. Traditionally, judges had to master both state and federal law from the inception of American legal education, but lacked similar indoctrination in international and transnational principles. This alone can explain a difference in comfort level with the two forms of hybrid lawmaking. Adding to this comfort for state/federal hybridity, federal judges may look to the Supremacy Clause as a

¹⁰² For a description of the various bills, see Laura E. Little, *Transnational Guidance in Terrorism Cases*, 38 GEO. WASH. INT'L L. REV. 1, 1–2 (2006).

¹⁰³ *Medellin v. Texas*, 128 S. Ct. 1346, 1372 (2008).

¹⁰⁴ While domestic law scholars have long observed the close relationship between state and federal law, that same tradition is apparently absent among international law scholars theorizing on the relationship between domestic and foreign law. Compare Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1159 (2007) ("International law scholars have not often paid attention to the pluralist literature, nor have they generally conceived of their field in terms of managing hybridity."), with Robert Schapiro, *supra* note 87, at 812 (describing federalism as an enterprise that calls for "managing the overlap of state and federal law," rather than separating state and federal spheres of authority).

¹⁰⁵ The many references to states and state citizens in Article III suggest that the Framers were mindful of the supervisory role of federal courts in negotiating state and federal power struggles. See U.S. CONST. art. III. Article III references to foreign nations and foreign subjects exist, but are not nearly as plentiful—particularly compared to the references to those matters in Articles I and II, defining the power of the other branches of the federal government over foreign affairs. See *id.*; see also U.S. CONST. art. I; U.S. CONST. art. II.

bulwark against severe threats to federal identity.¹⁰⁶ A parallel safety net does not exist for hybrid lawmaking that mixes domestic law with foreign or international hybrid. Finally, the federal judiciary has historically enjoyed greater latitude in negotiating power struggles between federal and state governments than power struggles between foreign and domestic governments or between domestic governments and international entities. Assertions of judicial supremacy over complex federalism questions characterize the former context, while suggestions of judicial deference and abstention have punctuated the latter contexts.

Although each context has different emotional and political stakes, the contexts share sufficient commonality to benefit from overlapping analysis. This is particularly true for the enterprise here, where I focus on such methodological questions as: How do the legal principles from two systems usually combine? Do they tend to take the form of rules or standards? What paths do hybrid laws take once created? Can the judiciary maintain control over the course of hybrid doctrine? The answers to these questions present sufficiently universal matters about legal process as to apply meaningfully in each context.¹⁰⁷

C. Hybrid Lawmaking: Relevant Scholarship Strands

Given the prevalence of hybrid lawmaking in federal courts, one might expect a rich scholarship on the subject. The majority of materials, however, tend to mention the concept in passing, while focusing instead on slightly off-topic matters, such as federal common law and the *Charming Betsy* canon.¹⁰⁸ Sustained interest in

¹⁰⁶ As the Supreme Court stated in *Testa v. Katt*, 330 U.S. 386 (1947), the Supremacy Clause ensures that federal law *is* state law, thus establishing an intimate relationship between state and federal sovereignty not present in the domestic/foreign context. The federal power ensured by the Supremacy Clause is, of course, moderated by the limited nature of federal power inherent in the Constitution as well as the Tenth Amendment.

¹⁰⁷ For other studies finding a useful analogy between each context, see Berman, *supra* note 104, at 1211, in which Professor Berman describes the work of Mattias Kumm as advocating “what amounts to a federalist approach to national/supranational relations.” *Id.* (citing Mattias Kumm, *The Legitimacy of International Law: A Constitutional Framework of Analysis*, 15 EUR. J. INT’L L. 907, 922 (2004)); see also T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1991 (2004) (analogizing the Supreme Court’s approach in striking down statutes on federalism grounds with the Court’s approach to transnational lawmaking); Judith Resnik, *Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT’L J. CONST. L. 33, 42 (2008) (drawing on experience with the interaction of state and federal law in analyzing reaction to United States courts using foreign law); Resnik, *supra* note 82, at 1576 (arguing that adjudication must not be essentialized and must instead be understood in light of the reality that “[s]tates and localities—through city councils, state legislatures, national organizations of local officials, and courts—serve as both importers and exporters of law”).

¹⁰⁸ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act

hybrid lawmaking has, however, begun to increase, with important scholarship generated from a number of angles, including scholarship focusing on federalism, choice of law, and on courts' use of transnational and international materials in domestic decision making. While we have limited knowledge about how the hybrid lawmaking in *Medellin* and *Travelers* will fare, they hold useful lessons as these various strands of scholarship expand and interrelate.

1. Federalism Scholarship

Much federalism scholarship relevant to this Article concerns reinforcing boundaries between state and federal law, focusing on such matters as the states' rights foundations of *Erie Railroad Co. v. Tompkins*,¹⁰⁹ the independent and adequate state ground doctrine, and various abstention doctrines keeping federal courts out of the business of adjudicating state law matters.¹¹⁰ A competing strand of relevant scholarship derives in large part from Robert Cover's less defensive, more upbeat approach to federalism, viewing our system of "jurisdictional concurrency"¹¹¹ as an opportunity for creative problem-solving. From this perspective, "tensions and conflicts" over social issues can play out in multiple jurisdictions with diverse structures.¹¹² Building on this tradition, several federalism scholars emphasize the benefits of hybrid regulation over its detriments.

Among the benefits of hybrid legal regulation often listed are diversity in perspective, cross-fertilization, and redundancy. Diversity of perspective allows more than one voice to contribute to regulation. For example, as explained by Professor Robert A. Schapiro, in tort law, hybrid lawmaking can allow federal law to regulate "systemic risks" while state law simultaneously provides "redress for harmed

of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."). See generally Berman, *supra* note 104, at 1159 ("International law scholars have not . . . generally conceived of their field in terms of managing hybridity.").

¹⁰⁹ 304 U.S. 64 (1938).

¹¹⁰ See, e.g., Green, *supra* note 78 (describing scholarship championing federalism foundations of *Erie*); Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 943, 993 (1965) (reviewing difficulties posed by searching federal court review of the adequacy of state grounds); Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 B.Y.U. L. REV. 811, 832–56, 825–28 (finding constitutional authority for abstention doctrines and the independent and adequate state grounds doctrine); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 993 (1985) (discussing the importance of the United States Supreme Court honoring a state court's "plain statement" about the adequacy and independence of state grounds).

¹¹¹ Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 682 (1981).

¹¹² *Id.*

individuals.”¹¹³ Cross-fertilization of legal concepts results when state and federal regulators engage in dialectical interchange. The interchange can occur in dual litigation pursued in two separate systems,¹¹⁴ as well as when one jurisdiction interprets another’s laws¹¹⁵—such as occurred in *Medellin* and *Travelers*. Redundancy—the argument goes—allows for litigants to capitalize on the strengths of different systems and for one jurisdiction to correct errors forged in another jurisdiction.¹¹⁶

Some commentators take a less sanguine view of hybrid regulation in the federalism context. Analyzing the specific issues of class actions and punitive damages doctrine, Professors Samuel Issacharoff and Catherine M. Sharkey highlight problems of legal instability and unfairness resulting from multiple regulations on one wrong.¹¹⁷ In his preemption research, Professor Schapiro also seriously considers

¹¹³ Schapiro, *supra* note 87, at 820.

¹¹⁴ See, e.g., Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 168–69 (2006); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1214–15 (2004) (arguing in favor of a multi-jurisdictional solution to dispute resolution to accommodate state and federal interests); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 315 (2005) (“[D]ual court systems can serve as laboratories in which different interpretations of the same provision are tested.”).

While a primary focus of this Article, hybrid lawmaking is not the only mechanism for hybrid governance. As Professor Barry Friedman has demonstrated, hybrid governance also arises from multiple litigation structures. Professor Friedman documents how federal jurisdiction doctrines facilitate shared multijurisdictional structures for dispute resolution. Friedman, *supra* at 1232–33 (pointing out the multijurisdictional decisionmaking made possible by *Pullman* abstention, collateral review, and double-tracking or sequencing litigation in two or more fora).

¹¹⁵ See, e.g., David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 324 (1977) (explaining how diversity jurisdiction explores the “migration of ideas” between state and federal courts).

¹¹⁶ Cover, *supra* note 111, at 682 (celebrating the institutional conflict inherent in the federalist system). Cover also credited jurisdictional redundancy with reducing judges’ pursuit of self-interest and promotion of bias or preferred ideologies. *Id.* at 658–59, 664; see also William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1589 (2007) (analogizing the benefit of jurisdictional redundancy to the benefit of biological diversity: fostering stability and protection from the consequences of shocks to the system).

Theorists disagree about which governmental institution is best situated to manage the challenges of hybrid regulation. Compare Schapiro, *supra* note 87, at 819 (reasoning that Congress is best equipped to make the initial regulatory decision since it “can receive information from a wider variety of sources and balance the various policy risks and benefits” over redundancy), with Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 757 (2008) (“[C]ourts are more sensitive to the federalism dimensions of preemption than either Congress or federal agencies are likely to be.”). At least one commentator takes the view that state courts are the most appropriate fora for litigating hybrid state/federal claims. See Preis, *supra* note 51, at 199.

¹¹⁷ Issacharoff & Sharkey, *supra* note 2, at 1424–27. In scrutinizing punitive damage litigation, Professors Issacharoff and Sharkey see hybrid lawmaking as likely to increase the “cost of policing against any given state’s encroachment on the autonomy of another” as well as the problem of “multiple punishments” imposed for one wrong. *Id.* at 1423, 1427.

potential pitfalls of concurrent regulation. Coming out in favor of concurrent regulation, Professor Schapiro nonetheless emphasizes its important downsides, including increased cost of compliance with regulations, reduced uniformity, and lack of governmental accountability.¹¹⁸ While recognizing that multiple regulations blur lines of political accountability and create conflicting obligations for regulated actors, Professor Schapiro argues that diminishing significance of “territorial boundaries” reduces these detriments.¹¹⁹

We no doubt have insufficient experience with the type of hybrid lawmaking in *Medellin* and *Travelers* to draw definitive conclusions from the federalism scholarship. Preliminarily, however, both the *Medellin* and *Travelers* contexts appear to illustrate both the benefits and the detriments of federalism that scholars have identified. Focusing on *Medellin* as an example, one can see evidence of the inconsistency and instability described by Professors Schapiro, Issacharoff, Sharkey, and others. While the *Medellin* Court professed faithful adherence to state procedural law (i.e., consistency and stability), the actual landscape of federal precedent evaluating state procedural bars reflects a different picture. Plenty of cases suggest that a criminal defendant may find that whatever may constitute a procedural bar in state court proceedings has a different consequence in federal proceedings.¹²⁰ At the same time, a federal court interpreting the scope of a procedural bar may point to state authority as the driving force behind its decision, thereby avoiding (in the name of deference) direct accountability for its decision. This creates shifting standards for procedural matters and uncertainty as to the precise extent of federal control.

On the other hand, one can see evidence of the beneficial aspects of the federalism in *Medellin* and *Travelers*. Focusing on the *Travelers* example, one might argue that bankruptcy courts, state courts, and private actors all achieve greater understanding of relevant factors when they view attorney’s fees claims in light of the Bankruptcy Code: bankruptcy courts can fine-tune their understanding of bankruptcy policy and state contract principles, while state courts and private actors can appreciate a broader range of incentives that inform attorney’s fees clauses in contracts. As with an alloy created from distinct metals, the hybrid bankruptcy/contract principles may be a stronger instrument for negotiating the

¹¹⁸ Schapiro, *supra* note 87, at 823–24.

¹¹⁹ *Id.*

¹²⁰ See *supra* notes 62–63 and accompanying text for discussion of contexts in which the Supreme Court has authorized federal courts to ignore a state procedural bar on direct and habeas review.

challenging issue of attorney's fees in bankruptcy than contract law or bankruptcy law could have created if acting alone.

2. *Conflict of Laws Scholarship*

Choice of law approaches readily divide into those that justify the application of forum law and those that attempt to use "neutral" principles to guide courts in choosing which among competing sovereigns should provide the governing law. In the past, courts and commentators rarely seriously entertained the alternative possibility of creating hybrid principles that govern the substance of multijurisdictional legal relations.¹²¹ As a stark illustration of this disinclination, early decisions grappling with choice of law in the Internet even regressed away from accommodating competing sovereign demands, relying instead on justifications for indulging forum power only.¹²² This insular approach may be changing, however, particularly for scholarship focused on international settings. Indeed, scholars have begun to herald the benefits of transnational judicial dialogue¹²³ and cross-fertilization when the

¹²¹ Professor Berman describes this traditional rigidity of choice of law doctrine, which often appears particularly ill-suited to the challenges of the technologically changing, globalizing world:

The three classic legal doctrines often grouped together under the rubric of conflict of laws—jurisdiction, choice of law, and judgment recognition—are specifically meant to manage hybrid legal spaces. As discussed previously, however, although these doctrines are where one would most expect to see creative innovations springing forth to address hybridity, they have often been deployed only in the service of sovereigntist territorialism and tend to become mired in often fruitless or arbitrary inquiries, such as how best to locate activities in physical space in order to choose a single nation-state's law or court system as the sole governing authority.

Berman, *supra* note 104, at 1228; *see also* Little, *supra* note 48, at 956–62 (discussing "[f]ormalism's [l]ong [e]stablished [p]lace in [c]hoice of [l]aw [d]octrine").

¹²² *See, e.g.,* *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999) (applying New York law to regulate offshore entity offering Internet gambling); *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575 (Austl.) (applying Australian law in defamation action against United States news provider); *UEJF et Licra c/ Yahoo! Inc. et Yahoo France*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm#texte>, *translated at* *UEJF & Licra v. Yahoo! Inc.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (Richard Salis trans.) (applying French law to regulate ability of United States auction site to offer Nazi memorabilia); *Bundesgerichtshof [BGH] [Federal Court of Justice]* Dec. 12, 2000, 46 *Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt]* 212 (F.R.G.), *available at* <http://www.bundesgerichtshof.de/> (follow "Entscheidungen" hyperlink; then search "Dokumentsuche Datum" for "12.12.2000"; then follow "1 StR 184/00" hyperlink) (applying German law to regulate Australian web page posting holocaust-denial information).

¹²³ *See, e.g.,* Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 *YALE J. INT'L L.* 409, 424 (2003).

courts of one sovereignty apply the laws of another sovereignty.¹²⁴ This process may enable what Professor Robert Ahdieh describes as “incremental” and “non-invasive” integration of nondomestic legal principles, allowing courts and other institutions to “internalize universal norms . . . on their own terms.”¹²⁵

Beyond noting the synergy that may result from a bilateral choice of law determination, some conflicts scholars have articulated an approach to choice of law that seeks to empower judges to create special rules of decision in multijurisdictional cases, an approach that Professor Paul Schiff Berman has coined “substantivism.”¹²⁶ Arthur von Mehren propounded an early proposal in the domestic, interstate context, advocating “the advantages, in certain multistate or multiple contact situations, of applying special rules that are not necessarily chosen from among provisions in the domestic law of any of the jurisdictions viewed as legitimately concerned with the resolution of the issues presented.”¹²⁷ Subsequently, Friedrich Juenger,¹²⁸ Luther McDougal,¹²⁹ and Graeme Dinwoodie¹³⁰ have pushed this type of thinking into the transnational context.

In documenting trends toward hybrid regulation, Professor Berman has identified opposing strategies that communities might take to accommodate conflicting regulations. He explains that “communities might seek to ‘solve’ such conflicts either by reimposing the primacy of territorially-based (and often nation-state-based) authority or by seeking universal harmonization.”¹³¹ In the first instance, the communities build walls against legal incursion, and in the second

¹²⁴ See, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 193 (2003).

¹²⁵ Ahdieh, *supra* note 11, at 1237.

¹²⁶ Paul Schiff Berman has provided a useful, concise review of the recent scholarly proposals. See Berman, *supra* note 57, at 1852–53 (reviewing scholarly thinking on hybrid lawmaking in domestic and international settings since 1974 and labeling the approach “substantivism”).

¹²⁷ Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 348 (1974).

¹²⁸ See, e.g., Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1317 (1999) (suggesting that courts should look to whether there is an “interstate or international [rule]” that governs, rather than trying to characterize a dispute as arising in one particular jurisdiction).

¹²⁹ Luther L. McDougal III, “Private” *International Law: Ius Gentium Versus Choice of Law Rules or Approaches*, 38 AM. J. COMP. L. 521, 536–37 (1990) (advocating development of transnational principles as the best way to account for “substantive policies”).

¹³⁰ Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 542–69 (2000) (identifying arguments in favor of allowing courts to resolve international copyright disputes by creating substantive law that reflects interests of nations and parties involved).

¹³¹ Berman, *supra* note 104, at 1162.

instance, the communities call for “harmonization of norms, more treaties, the construction of international governing bodies, and the creation of ‘world law.’”¹³² Because both poles can be cumbersome, difficult, or politically unpalatable, Professor Berman highlights an attractive middle ground, which encourages mechanisms for mediating between the two poles.¹³³ The *Medellin* and *Travelers* examples explored here are illustrations of two strategies for negotiating that middle ground, providing lessons for negotiating the challenges of what he calls “hybridity.”¹³⁴

3. *Scholarship on Integrating Foreign and International Principles into Domestic Decisionmaking*

Related to scholarship that advocates creating hybrid principles is a rich literature documenting the debate about integrating nondomestic norms—including international and transnational laws—into federal court decisionmaking. Created largely in response to controversial United States Supreme Court decisions,¹³⁵ the debate literature rehearses potential benefits and detriments of the practice of citing foreign and international laws—as well as justifications and contrary arguments about the practice. Recently, the debate has also analyzed the role of state and local decisionmaking in transferring international and transnational principles into laws of the United States.¹³⁶

The arguments on both sides of the debate are complex, and I describe only broad outlines here. Those advocating integrating transnational and international principles usually echo the benefits of cross-fertilization, progress, and diversity in perspective found in the federalism literature.¹³⁷ In addition, informing domestic law with lessons from abroad has been said to serve good decisionmaking

¹³² *Id.* at 1163 (footnotes omitted).

¹³³ *Id.* at 1164–65.

¹³⁴ *Id.* at 1165.

¹³⁵ See Aleinikoff, *supra* note 107, at 1989 (noting that although Supreme Court opinions and “extra-judicial speeches” spurred controversy, the practice of looking at foreign legal sources to aid constitutional decisionmaking is not “terribly new”).

¹³⁶ See, e.g., Ahdieh, *supra* note 11 (exploring consequences of states and localities becoming increasingly engaged with foreign authorities and international questions); Resnik, *supra* note 82, at 1576 (reframing the debate about use of foreign law in light of the reality that “[s]tates and localities—through city councils, state legislatures, national organizations of local officials, and courts—serve as both importers and exporters of law”).

¹³⁷ See, e.g., Aleinikoff, *supra* note 107, at 1992–93 (outlining the argument that “giving force to transnational rules laid down by non-American decision makers surrenders U.S. sovereignty”); Resnik, *supra* note 82, at 1670 (arguing that the practice provides a vehicle for “dislodging long-entrenched definitions of the bounded roles assigned to women, men, and governments”).

methodology and judicial professionalism.¹³⁸ On the other side, critics also echo the federalism literature, referring to possible problems with inconsistency and instability.¹³⁹ They argue that the practice blurs jurisdictional boundaries and thereby facilitates a loss of sovereignty and national identity.¹⁴⁰ Some critics also reason that law that does not spring organically from the people of a sovereign territory cannot be legitimately labeled as a product of democracy.¹⁴¹

The cases I explore here provide a discreet, but meaningful lesson for evaluating these competing claims. As argued above, *Medellin* can be used to illustrate potential problems with inconsistency and instability, while *Travelers* can illustrate benefits of cross-fertilization and diversity in perspective.¹⁴² Both decisions try to account for a preexisting, complex system of state regulation, and thus represent a court's professional effort to avoid insularity.¹⁴³ For critics of incorporating foreign and international law who are concerned with preserving democratic values, one might point out that both decisions flow from the Roberts Court's firm belief in its power of judicial

¹³⁸ See, e.g., Little, *supra* note 102, at 4–30 (outlining reasons why the use of comparative and international law principles in terrorism cases serves good decisionmaking methodology and judicial professionalism).

¹³⁹ See, e.g., Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 72–73 (2004) (suggesting that judges use nondomestic law material haphazardly, even cherry picking those laws favorable to the positions they are justifying).

¹⁴⁰ Resnik, *supra* note 82, at 1669–70 (summarizing this criticism as rising from an “impulse to assert . . . bright lines of jurisdictional competencies” which derive from the fear “that with border blurring comes a loss of identity”).

In developing her own approach to the question, Professor Resnik draws a particularly important connection with federalism scholarship. She observes that suspicion of foreign law in United States decisionmaking stems in part from a “sovereigntist” orientation, which focuses on how law defines a national identity. Resnik, *supra* note 107, at 40–42 (arguing that under the sovereigntist orientation, “law is metonymic for the state”). Finding this approach unsurprising, she sees its roots in American federalism, which she describes as “grounded in the insight that the autonomy to make law is a source of power and of identity.” *Id.* at 42. As evidence, she points to the two areas examined in this Article: the United States Supreme Court's independent and adequate state ground doctrine as well as the *Erie* doctrine, which both police the border between state and federal law. *Id.* (citing *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938))).

¹⁴¹ Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 133 n.4 (2006) (collecting sources supporting the proposition that only territorially defined sovereigns exercise power rooted in democracy). In an article relevant to the methodological focus of the present study, Michael Dorf takes up the anti-democratic consequences of one lawmaking body's decision to incorporate the law of another jurisdiction in dynamic form, meaning that the law of the incorporating jurisdiction changes automatically when the foreign jurisdiction changes the law. See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 104 (2008).

¹⁴² See *supra* notes 113–20 and accompanying text for discussion of these federalism arguments.

¹⁴³ See, e.g., Janet Koven Levit, *Going Public with Transnational Law: The 2002–2003 Supreme Court Term*, 39 TULSA L. REV. 155, 157–58 (2003) (suggesting that consideration of nondomestic law avoids a “parochial” orientation).

review over the questions presented. Once one stipulates to the legitimacy of this power, one need simply accept that the hybrid lawmaking in both cases illustrates a natural outgrowth of the federal judiciary's role in our democratic system, negotiating the delicate balance between state and federal power.¹⁴⁴

Perhaps the most important message from *Medellin* and *Travelers* for the foreign/international law debate focuses on fear of sovereign identity loss. In this regard, the Supreme Court's approach in both cases suggests a calming message. Although actors negotiating state and federal regulations may occasionally encounter inconsistencies and contradictions, the cases do suggest that the United States Supreme Court is adroit at managing hybrid regulation. In both contexts, the Roberts Court showed that it could defer to another sovereign's legal principles while losing neither federal identity nor meaningful federal judicial control of legal doctrine. In the words of Professor Judith Resnik, the Court demonstrated that "[o]ne can embrace law as a technique for forging a national identity without valorizing the exclusivity of the sources of national law."¹⁴⁵

Of course, for the reasons reviewed above,¹⁴⁶ important factors make hybrid state/federal lawmaking more familiar and less controversial than hybrid nondomestic/domestic lawmaking. Indeed, we saw this dichotomy in the *Medellin* case itself, where the Court approached the international issues with an orientation reflecting American isolation and exceptionalism. That is, the Court operated in the realm of sovereignty sharing (federal law deferring to state law principles) at the same time that it was seeking to erect barriers against incursion on United States authority.¹⁴⁷ For the purposes of my project here, this irony does not present a troublesome contradiction. Even though the *Medellin* Court certainly did not embrace international law, other parts of the decision show that a federal court does not necessarily dilute federal sovereignty and

¹⁴⁴ Berman, *supra* note 104, at 1184 (pointing out that the democracy critique should dissipate "once one accepts the basic democratic legitimacy of countermajoritarian judges exercising judicial review"); see Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 55 (2004) (noting that judges' jobs are not to indulge "majoritarian impulses").

¹⁴⁵ Resnik, *supra* note 107, at 63.

¹⁴⁶ See *supra* notes 101–107 and accompanying text for discussion of the differences between state/federal hybrid lawmaking and foreign/domestic hybrid lawmaking.

¹⁴⁷ *Medellin v. Texas*, 128 S. Ct. 1346, 1372 (2008). *Medellin* is a stark contrast to decisions in which the United States Supreme Court found a form of "foreign affairs preemption" preventing state courts from regulating matters pertaining to foreign affairs. For a review of these foreign affairs preemption decisions, see Resnik, *supra* note 89, at 75–78.

identity by integrating another sovereign's legal precepts into the body of federal law.¹⁴⁸

The question then is whether fear of identity loss is so potent as to prevent translation of the hybridity lesson from the state/federal context to the nondomestic/domestic context (with nondomestic law including international law, foreign law, or both). One possible antidote to such fear is for officials to experiment with hybrid domestic/nondomestic law incrementally, as described by Professors Ahdieh and Berman.¹⁴⁹ One can also expect that the fear's intensity depends on *how* a domestic court actually might use the foreign or international law. This question of *how* law is used has received surprisingly little attention in the legions of pages drafted over the debate concern *whether* to use foreign and international law in domestic decisionmaking. Although the commentary canvasses fine details relating to justifications for and arguments against the practice, less scholarly effort has focused on *how* courts can use foreign or international law.¹⁵⁰ This is somewhat surprising, since the ways in which a court uses another authority's law directly informs the legitimacy of its use.¹⁵¹ Thus, analysis of *how* the courts in *Medellin* and *Travelers* used the state law principles bears on how favorably courts might regard these examples of hybrid lawmaking. To this issue I now turn.

D. Methodological Lessons of Medellin and Travelers

One sovereign's use of another sovereign's law can range from noncontroversial, rhetorical techniques on one end of the spectrum to wholesale, unqualified use on the other end. Noncontroversial, rhetorical techniques might include quoting colorful or persuasive language from another jurisdiction's opinion, invoking the other

¹⁴⁸ *Medellin*, 128 S. Ct. at 1363, 1372.

¹⁴⁹ For articulation of these incremental approaches, see, for example, Ahdieh, *supra* note 11, at 1237; Berman, *supra* note 104, at 1165; *see also* notes 121–25 and accompanying text for further discussion of this literature.

¹⁵⁰ For sources discussing *how* foreign law might be used in a domestic setting, see, for example, Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 7 (2006) (noting that in constitutional analysis, the Supreme Court has directly relied on international law, used it as a background principle for interpreting the Constitution, or invoked it as evidence of common values); Koh, *supra* note 144, at 45–46 (observing that courts use nondomestic law to identify parallel rules, illustrate empirical consequences, and weigh community standards). *See generally* Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653, 664–91 (2009), available at http://www.harvard-jlpp.com/wp-content/uploads/2009/03/sitaraman_final.pdf (canvassing literature analyzing how courts have used foreign law).

¹⁵¹ Sitaraman, *supra* note 150, at 656 (observing that before evaluating arguments about whether domestic courts should use foreign law, "one must identify which method of usage is being judged").

jurisdiction's rule as a contrasting foil, or establishing a factual matter by using the other jurisdiction's law descriptively.¹⁵² Also relatively uncontroversial are those uses that simply borrow another jurisdiction's law because it reflects a good idea.¹⁵³ On the more controversial end of the spectrum are those circumstances where the courts of one sovereign are actually adopting the law of another sovereign as authoritative. In this instance, the court using the other jurisdiction's rule purports to surrender a slice of its own authority to the other jurisdiction. *Medellin* and *Travelers* represent this type of use. In both cases, the Court suggested—with little actual justification on the point—that it was adopting state law without qualification.

Now, one might argue that the federal/state lawmaking in *Medellin* and *Travelers* differed from domestic uses of foreign or international law because the Supreme Court acted as though the other jurisdiction's law constrained its decisionmaking: in both cases, the Court suggested that it deferred to state law because—for what appear to be untheorized reasons—our federalist system required it to do so.¹⁵⁴ Yet that orientation makes all the more remarkable the Court's retention of power to control when and how the state law manifested.

¹⁵² *Id.* (manuscript at 12–16) (describing “quoting language,” “[i]llustrating contrasts,” “logical reinforcement,” and “factual propositions” as “[u]nproblematic [u]ses of [f]oreign [l]aw”).

¹⁵³ One sees this often when one state borrows a new principle of state common law from another state. This type of use may occur more frequently within the internal domestic context of the United States than in the foreign/domestic context. See Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283, 1286 (2004) (noting that recent decisions “invoking international or comparative law sources [have not] explicitly looked to the reasoning of a foreign decision-maker”).

¹⁵⁴ Although the Court in *Medellin* and *Travelers* declined to follow it, precedent would have supported a decision to accommodate both federal and state sovereignty through an inverse approach to hybridity with the Court declaring the matter one governed by federal law, which would take state law for its content. This is the approach that the Court pursued in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729–30 (1979). In embracing a hybrid approach, the Court explained:

We are unpersuaded that, in the circumstances presented here, nationwide standards favoring claims of the United States are necessary to ease program administration or to safeguard the Federal Treasury from defaulting debtors. Because the state commercial codes “furnish convenient solutions in no way inconsistent with adequate protection of the federal interest[s],” we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions.

Id. at 729 (citation omitted) (alteration in original). See generally Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 646–49 (2006) (analyzing the process of incorporating “state law as the federal common law rule”). *Kimbell Foods* seems to be an example of hybrid law created to protect one's sovereignty and to harness preexisting refinements in the law of another sovereignty. That is, the *Kimbell Foods* Court on one hand found it necessary to use the vehicle of federal common law to protect federal interests (federal sovereignty), but on the other hand found it prudent to embrace already existing, intricately

How did the Court pull off this apparently paradoxical maneuver? One insight lies in the **rule** versus **standard** typology discussed above. I suspect that it is no accident that, having apparently ceded to the states' sovereignty over law formulation in both cases, the Court pursued a standards-based approach to law implementation in both cases.¹⁵⁵ As explained earlier, standards allow adjudicators to evaluate the legality of conduct after the conduct has occurred and its effects become apparent.¹⁵⁶ By describing the legal principles in both cases as dependent on changing factors, the Court retained the ability to calibrate precisely how much sovereignty it relinquished in future cases implicating the same or similar issues.

At first blush, contradictory arguments emerge about whether standards or rules are better suited to managing hybrid lawmaking. Critics denounce standards as notoriously problematic due to their invitation to indeterminacy, partiality, manipulation, and unpredictability.¹⁵⁷ From this perspective, wisdom counsels avoiding

designed state laws already in place. By contrast, the *Travelers* and *Medellin* Courts found the legal issues such that the default law with a primary claim to governance was state, not federal, law.

¹⁵⁵ In blending state and federal law in the two cases, the Court did pursue differing analytical structures. In *Medellin*, federal principles regarding honoring state procedural rules in habeas proceedings provided the first, albeit nearly implicit, step in the Court's analysis. Once this "federal" layer was satisfied, the Court gave full effect to the state law of procedural default. In *Travelers*, by contrast, the federal interest could be found at any point in the consideration and application of state law. Once a bankruptcy court encounters the federal interest, that interest can dominate or "hijack" the dispute's resolution. In a metaphor to candy products, *Medellin* illustrates an analytical form akin to an "M & M"—with state law representing the chocolate center and federal law representing the colorful candy coating. The candy coating embodies federal standards for when a federal court should honor state procedural law and the chocolate represents the state procedural law itself. *Travelers*, on the other hand, illustrates a form akin to a Nestle Crunch Bar—with state law governing such matters as contract or property representing the chocolate and federal law governing bankruptcy policy representing the crunchy bits distributed randomly throughout. To make the metaphor more complete, the crunchy bits would have the potential to explode and dominate the candy bar's taste. This would occur if the federal bankruptcy policy (represented by the crunchy bits) were so potent as to control the disposition of the particular legal issue. Further cases may illuminate the import of these observations.

¹⁵⁶ Kaplow, *supra* note 45, at 560.

¹⁵⁷ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177–80 (1989) (criticizing discretionary standards as fostering uncertainty and injection of "political or policy preferences" into decisionmaking).

As Erwin Chemerinsky has observed in the context of due process litigation, hybrid lawmaking makes possible greater gamesmanship in negotiating procedural limitation. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 213–14 (3d ed. 2006). For example, certain federal jurisdiction concepts—such as supplemental jurisdiction and the Eleventh Amendment *Pennhurst* doctrine—prevent a federal court from entertaining state law claims where certain circumstances are present. The hybrid nature of the due process analysis, however, allows due process claims to serve as a vehicle for bringing claims with a state law genesis into federal court. All one needs to do is "argue that the state law in question gives rise to a liberty or property interest protected by the due process clause of the Fourteenth

standards-based lawmaking and decisionmaking for sensitive power-sharing issues since rules foster clarity and certainty, characteristics that are well-suited to defining and maintaining lines of authority.¹⁵⁸ Rules operate as jurisdictional boundaries, demarking precisely what a decisionmaker must or must not do.¹⁵⁹ On the other hand, hybrid lawmaking occurs in a context calling for precisely the opposite approach: venturing into the metaphoric legal "territory" of another sovereign. That territory is likely unfamiliar to the adjudicator, who will not be able to anticipate all consequences of a decision. Given this uncertainty, the flexibility of standards allows retreat or modifications in future cases with unforeseen ramifications. In addition, this escape hatch might constrain a decisionmaker's fear of sovereign identity loss that seems to accommodate hybrid lawmaking.

Which of these competing arguments should prevail? A look at hybridity's analytical underpinnings reveals a tie-breaker. Where a court engages in hybrid lawmaking, it implicitly rejects the view of authority as fixed and bipolar. This point of view seems inconsistent with the rigid formality of rules. As Frank Michelman describes the process, standards-based decisionmaking allows an adjudicator to resolve "normative disputes by conversation, a communicative practice of open and intelligible reason-giving."¹⁶⁰ Hybridity implicitly accepts the validity of multiple jurisdictions' input on a particular point of regulation¹⁶¹ and is thus more compatible with the reconciliatory approach made possible by standards. Rules, by

Amendment." *Id.* at 214. This occurs because under FEDERALLY created due process doctrine, "state law can create both liberty and property rights, either explicitly or by creating an expectation that gives rise to a vested right." *Id.* One might argue that a standards-based approach to hybrid lawmaking makes possible greater manipulation of jurisdictional barriers—presumably a practice that does not serve straightforward and effective governance.

¹⁵⁸ Indeed, John Preis argues that a standard approach should be replaced with a rule approach in determining jurisdiction over hybrid law cases. Preis, *supra* note 51, at 192.

¹⁵⁹ FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 231–32 (1991). Professor Schauer explains that "the essence of rule-based decision-making lies in the concept of jurisdiction[.] [R]ules . . . narrow the range of factors to be considered by particular decision-makers, [thus establishing and constraining] the jurisdiction of the those decision-makers." *Id.*

¹⁶⁰ Frank I. Michelman, *The Supreme Court, 1985 Term – Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986).

¹⁶¹ Professor Barry Friedman makes a similar observation in the context of allocating adjudicative responsibilities between state and federal courts. Friedman argues that the allocation issue might be effectively resolved without a bipolar, either/or paradigm. Friedman, *supra* note 114, at 1214–15. In this regard, Professor Friedman outlines a number of ways in which hybrid, multijurisdictional structures are used successfully to resolve disputes—*Pullman* abstention and *Collateral Review*, to name just two.

contrast, “block the dialogue”¹⁶² that is necessary to navigate the competing approaches of the concerned sovereigns.¹⁶³

CONCLUSION

In *Medellin* and *Travelers*, the Supreme Court’s accommodation of competing authorities’ concerns was far from perfect. The Court’s rhetoric of deference to state prerogatives in both contexts obscured their hybrid character and muted their complexity. In this way, the decisions lacked candor about how the Court maintained federal control and thus missed an opportunity for effective guidance for future cases. From this point of view, both contexts illustrate the potential for overlapping spheres of sovereignty and authority to become “sites of conflict and confusion.”¹⁶⁴

Yet closer analysis reveals important lessons in how the Court managed the interlocking networks of governmental and nongovernmental interests in both contexts. Through adaptable, standards-based decisionmaking in both cases, the Court did in fact integrate competing regulatory claims by separate authorities. As contemporary circumstances call for a less rigid hierarchy and a flexible approach to global regulation, government actors are advised to recall that, for centuries, state and federal courts in the United States have been successfully negotiating among multiple state and federal laws. Albeit imperfect, this system of federalism provides an informative analogy to the challenges of global power sharing.

¹⁶² Sullivan, *supra* note 44, at 69.

¹⁶³ These arguments are consistent with Professor Schapiro’s arguments against a bipolar view of state/federal authority. See Schapiro, *supra* note 114, at 300 (stating that as an approach to federalism, “[d]ualism is fundamentally a formalist approach to the allocation of power between the states and the national government” and a “polyphonic” approach to federalism “can accommodate plurality, dialogue, and redundancy”).

¹⁶⁴ Berman, *supra* note 104, at 1162.

